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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No.....

GREAT LAKES STEEL CORPORATION,
a Delaware corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
THE BALTIMORE AND OHIO RAILROAD COMPANY,
ERIE RAILROAD COMPANY, and
THE PENNSYLVANIA RAILROAD COMPANY,
Respondents

PETITION FOR WRIT OF CERTIORARI

(Figures followed by letter "a", "b" or "c" in parenthesis refer to pages of Appendix "A" to Peitioners brief in the Court of Appeals for the Sixth Circuit which constituted the entire record in the District Court and consists of three volumes. The pages of the three volumes are numbered consecutively as follows:

Volume I—Pages 1a through 292a
Volume II—Pages 293b through 604b
Volume III—Pages 605c through 808c.)

To the Supreme Court of the United States:

Petitioner hereby applies for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review an order therein entered February 12, 1955. The Court of Appeals did not file an opinion.

A. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS DELIVERED IN THE COURTS BELOW.

This is a suit to set aside an order of the Interstate Commerce Commission. The order was entered pursuant to an opinion of the Commission filed May 28, 1946. *Great Lakes Steel Corporation v. The Baltimore and Ohio Railroad Company, et al.*, 264 I. C. C. 779.

The suit was heard by a three judge court for the Eastern District of Michigan, Southern Division, on the record made before the Interstate Commerce Commission. That Court dismissed the complaint for lack of jurisdiction (791c). *Great Lakes Steel Corporation v. United States, et al.*, 81 Fed. Supp. 450. On direct appeal to this Court the judgment of the District Court was reversed and the case remanded for trial on the merits by a single judge. *Great Lakes Steel Corporation v. United States, et al.*, 337 U. S. 952.

After remand the District Court again heard the case on the record made before the Interstate Commerce Commission and dismissed the complaint on the merits. *Great Lakes Steel Corporation v. United States, et al.*, 115 Fed. Supp. 31. The only statement in the opinion of the District Court of its reasons for dismissal is that the findings of the Interstate Commerce Commission are supported by substantial evidence and there was no irregularity in the proceeding or error in the application of the rules at law (807c).

On appeal the Court of Appeals for the Sixth Circuit, on February 12, 1955, affirmed the judgment of the District Court. The Court of Appeals filed no opinion. Its order of affirmance recited merely that the record contained substantial evidence supporting the order of the Commission and that the District Court properly applied the applicable law.

Attached hereto as Appendices "1", "2" and "3", respectively, are copies of the opinion and report of the Interstate Commerce Commission, the opinion of the District Court dismissing the complaint on the merits, and the order of the Court of Appeals affirming the District Court. All of the opinions and orders referred to above, except the opinion of this Court in the prior appeal and the order of the Court of Appeals, are contained in Appendix "A" to Petitioner's brief filed with the Court of Appeals, copies of which appendix are being filed with this petition.

B. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(1) The order of the Court of Appeals sought to be reviewed is dated February 12, 1955 and was entered on February 12, 1955.

(2) On the 18th day of March, 1955, the Court of Appeals entered an order denying a rehearing, which order was filed the 18th day of March, 1955. No application for an extension of time within which to petition for a writ of certiorari has been made.

(3) This Court has jurisdiction to issue the writ of certiorari to the Court of Appeals under the Act of June 25, 1948, being Public Act 773 of the 80th Congress, 28 U. S. C. 1254 (1).

C. THE QUESTIONS PRESENTED FOR REVIEW.

The essential point at issue in this petition is the error of the Court of Appeals and the District Court in refusing to set aside the order of the Interstate Commerce Commission. The important questions involved which have not been answered by the lower courts, except by a general denial, are:

1. Did the Interstate Commerce Commission err as a matter of law in holding that the transit tariffs were not applicable?

2. (a) Was there substantial evidence on the whole record to support the Commission's finding that the Navy Department elected to make the shipments from Mansfield as new and independent shipments?

   (b) Was there substantial evidence on the whole record to support the Commission's inference that the Navy was the shipper of the articles from Mansfield?

   (c) Can the Commission's inference (based solely on parole evidence) that the Navy was the shipper from Mansfield negative the express written contracts of carriage which show Petitioner as the shipper?

The decision of these questions will involve subsidiary questions discussed in section "H" hereof.

D. STATUTORY PROVISIONS WHICH THE CASE INVOLVES.

This case involves portions of the Interstate Commerce Act the text of which, so far as material to this case, is set forth in Appendix "4", pages 28 to 30 hereof. The following is a schedule of the applicable sections:

Section of Interstate Commerce Act	*Official Citation*
§6, par. (7)	49 U. S. C. 6 (7)
§8	49 U. S. C. 8
§9	49 U. S. C. 9
§13, par. (1)	49 U. S. C. 13 (1)
§16, par. (1)	49 U. S. C. 16 (1)
§22	49 U. S. C. 22

This case also involves Sec. 10 of the Administrative Procedure Act, 5 U. S. C. 1009, the text of which so far as material is set forth verbatim in Appendix "5", pages 30 to 31 hereof.

E. STATEMENT OF THE CASE.

A complaint was filed by Petitioner before the Interstate Commerce Commission under Section 6, paragraph 7 of the Interstate Commerce Act, alleging that The Baltimore and Ohio Railroad Company, Erie Railroad Company and The Pennsylvania Railroad Company had collected charges in excess of the tariffs, duly filed and published pursuant to the provisions of Section 6 (7) of the Interstate Commerce Act (5a).

The facts in the case are briefly as follows:—Petitioner had a contract with the Navy Department, during World War II, to furnish prefabricated steel buildings to be used for housing personnel at advance bases in the theaters of war (58a-60a). Under this contract, the material furnished by Petitioner was sold F. O. B. Mansfield, Ohio (284a) and shipped from Mansfield to ports of embarkation on government bills of lading (86a). The structural steel used in these buildings was manfactured at Petitioner's plants in Michigan and New York and shipped to Mansfield for fabrication and packaging for export (58a-59a). There is no question that the transit tariffs expressly permitted the shipment of iron and steel from Petitioner's plants in Michigan and New York to the transit point (Mansfield, Ohio), its fabrication there and its reshipment to the points of ultimate destination on the Atlantic, Gulf and Pacific Coasts. The tariffs provided that on shipments complying with their provisions the total charge for transportation would be the through rate applicable to the shipment from point of origin through the transit point to point of ultimate destination plus a transit charge, instead of the combination of the local rates from point of origin to transit point and from transit point to point of ultimate destination (I. C. C. Exs. 63, 65 and 68; 406b, 420b and 446b). The tariff of the Erie Railroad Company, Rule 2, gave this right to "operators of fabricating plants" who kept records and otherwise complied with the provisions of the tariffs (I. C. C. Ex. 63, 405b). The tariffs of The Baltimore and Ohio Railroad Company, Rule 10, (I. C. C. Ex. 65, 413b) and The Pennsylvania Railroad Company, Rule 10, (I. C. C. Ex. 68, 437b) gave this right to "shippers, transit house owners or operators" who kept records and otherwise complied with the provisions of the tariffs.

Each tariff provided two alternative methods whereby the lower rate could be obtained. One method was payment by the transit house operator of the inbound freight charge at the lawful rate from point of origin to transit point; the forwarding therefrom at the lawful rate from transit point to destination; the filing of a claim to recover a portion of such charge, determined by the difference between the through rate from point of origin to destination and the combination of the local rates from point of origin to the transit point and from the transit point to the point of destination, plus a charge for the transit privilege. This was the method followed by Petitioner. The other method was to ship the material from the transit point at the balance of the through rate (I. C. C. Exs. 63, 65, 68; 406b, 417b, 442b).

The shipments from Mansfield were all made on government bills of lading (89a, 274a-275a) which designated Petitioner as shipper or consignor. Such designation was in accordance with the regulations of the Comptroller General under whose jurisdiction government bills of lading are issued. (Volume 18, Decisions of Comptroller General, page 354). Each government bill of lading stated, as one of its conditions, that, unless otherwise specifically stated in the bill of lading, it was subject to the same rules and conditions as govern commercial shipments made on the usual forms of the carriers (I. C. C. Exs. 78, 79; 478b, 479b). Each of these bills of lading indicated that the shipment was a transit shipment (I. C. C. Exs. 77, 78, 79; 468b-479b) and these bills of lading were forwarded to the Navy for the use of its auditors in checking the correctness of freight bills paid by the Navy (251a) and more than two thousand of such bills had been paid at the time the testimony was taken before the Commission (167a).

In accordance with the transit tariffs, Petitioner filed with each railroad claims for refund of the difference between the combination of the separate rates to and from the transit points and the through rate plus the transit charge. The form of these claims and the procedure in their preparation were approved by Central Weighing & Inspection Bureau, the agent of the railroad for that purpose (I. C. C. Ex. 50; 374b). The railroads declined to pay the claims. Petitioner thereupon filed the complaint with the Interstate Commerce Commission alleging that it had been subjected to the payment of illegal charges in violation of Section 6 (7) of the Interstate Commerce Act and praying an award of damages for the amount of the overcharge. (The Complaint also asked that the railroads be required to cease and desist from making such charges in the future but before the case was heard by the Interstate Commerce Commission Petitioner ceased the operation of the plant at Mansfield thereby making unnecessary any prospective order.)

The opinion of the Interstate Commerce Commission stated the question for determination is "whether the movements to and from Mansfield were separate and independent shipments or constituted one continuous through movement under the provisions of the governing transit tariffs" (781c). The Commission held the transit tariffs inapplicable (782c) without any reference to or consideration of the terms of the tariffs. The Commission's decision was predicated on the following points:

1. Title to the property vested in the government when loaded on the cars at Mansfield.

2. The government was interested only in the transportation service from Mansfield.

3. It was the purpose of the Navy Department to make new shipments from Mansfield independent of the inbound movements.

4. The continuity of the shipments was terminated at the transit point when the Navy Department, which became the owner of the goods at that point, elected to ship them from that point as separate and independent shipments.

5. Control of the shipments from the transit point passed to the Navy Department who paid or would pay the freight charges "on the basis of the rates, as modified by Section 22 quotations or subject to land-grant deductions, from the transit point to final destinations."

6. Petitioner having lost control of the goods could not restore the continuity of the shipments.

The Commission did not find any failure on the part of Petitioner to comply with all of the applicable provisions of the transit tariffs. It likewise did not refer to or point out any provision of the transit tariffs which in any way made their application depend on any of the conditions which the Commission stated rendered them inapplicable. Petitioner contends that neither any nor all of the reasons advanced by the Commission are sufficient in law to render the transit tariffs inapplicable in the absence of provisions to that effect in the transit tariffs. Petitioner also contends that there was no substantial evidence on the whole record from which the Commission could find as a fact that it was the purpose of the Navy to make new shipments from Mansfield. Petitioner further contends that there was no evidence on the whole record from which the Commission could find as a fact that the Navy was the shipper of said articles from Mansfield;

that such finding was directly contrary to all of the evidence in the case and to the written contracts of carriage, the bills of lading, each of which designated Petitioner as the shipper.

Petitioner further contends that it was the duty of the lower courts to set aside this arbitrary and unlawful action on the part of the Interstate Commerce Commission and that the importance of the questions involved warrant the correction by this Court of the errors of the lower courts.

F. NOT APPLICABLE.

G. BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE.

The jurisdiction of the District Court in this case was determined by this Court in *Great Lakes Steel Corporation v. United States of America*, 337 U. S. 952.

H. ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioner contends that there are special and important reasons for granting certiorari in this case. In its overall aspects and in certain of its subsidiary aspects the lower courts and the Interstate Commerce Commission have decided important questions of federal law which have not been but should be settled by his Court. In certain respects, the decisions of the lower courts and of the Commission conflict with applicable decisions of this Court and with decisions of other Courts of Appeal. The District Court, by filing an opinion which completely failed to discuss any of the important questions involved, so far

departed from the accepted and usual course of judicial proceedings as to call for the exercise of the supervision of a superior court. That departure was made complete when the Court of Appeals without opinion affirmed the action of the District Court.

This case is important to Petitioner; but more importantly it should be decisively determined whether or not a shipper can rely on unambiguous tariffs filed by the railroads pursuant to Section 6 (7) of the Interstate Commerce Act or whether such tariffs are subject to modification, change and added conditions based on parole testimony given after the shipments are made. It is of particular importance to all government contractors who fabricate their material in transit and consequently to the government itself.

Does the Use of a Government Bill of Lading From the Transit Point Deprive a Transit House Operator of the Benefit of the Transit Tariffs?

The effect of the Interstate Commerce Commission's decision is to prevent the application of transit tariffs to all shipments made on government bills of lading, regardless of the provisions of the transit tariffs.

At the very least it raises the question that a government employee may testify several years after the shipments move (to an undemonstrated and a theretofore unannounced intention of the government) that the shipments from the transit point be considered as new and independent of the inbound movements thereby destroying the rights of the transit house operator under the transit tariffs. The effect of such a holding on government contractors and on the government itself, if permitted to stand, will be serious and adverse. It will substantially increase the costs of every

government contractor who fabricates his product in transit, and will thereby inevitably increase the price the government must pay for such products. The case is therefore of such substantial public importance as to warrant the consideration of this Court.

Can a Transit House Operator Be Denied the Benefit of Transit Tariffs on Shipments to Government Agencies in the Absence of Excluding Language in Such Tariffs?

The proceeding before the Interstate Commerce Commission was an action on contract. The contract is the tariff promulgated, filed and published by the railroad pursuant to Section 6 (7) of the Interstate Commerce Act. Such a tariff has been held to have the force of a statute. *Bull S. S. Lines v. Thompson,* 123 F. (2d) 943 (Cert. den. 315 U. S. 816). And well it may, because Section 6 (7) of the Interstate Commerce Act also prohibits the charging of a greater or lesser rate than that provided for in such a tariff.

It is a rule of long standing, uniformly enforced by the Interstate Commerce Commission and the courts, that a tariff will be presumed to contain all of the wording necessary to determine its meaning and effect; that parole evidence as to its meaning will be admitted only where the language itself is open to more than one construction; that having been drafted by the carrier, doubts as to its meaning will be resolved against the carrier; and that if it was intended that certain shipments or classes of shipments were to be excluded from its effect the carrier "should have accomplished such design by the use of clear and specific language". *Indiana Harbor Belt R. Co. v. Jacob Stern & Sons,* 37 F. S. 690 Dist. Ct. N. D. Illinois E. D. March, 1941; *Burrus Mill & Elevator Co. v. Chicago, R. I. & P. R. Co.,* 131 F. (2d) 532, C. C. A. 10th, Nov. 2, 1942;

Union Wire Rope Corporation v. Atchison, T. & S. F. Ry. Co., 66 F. (2d) 965. See also *St. Louis Cooperage Company v. New York Central R. Co. et al.*, 258 I. C. C. 593, 599; *Scrap Tin Plate Between Minnesota and Illinois*, 256 I. C. C. 15, 19; *Keith-Simmons Co., Inc. v. Nashville, C. & St. L. Ry.*, 265 I. C. C. 235, 238; and *Smalstig v. Baltimore & Ohio Railroad Company, et al.*, 255 I. C. C. 125.

As pointed out before, the Interstate Commerce Commission did not find that Petitioner had failed in any way to comply with the provisions of the transit tariffs. The record shows without contradiction complete compliance by Petitioner with all of their provisions. The Interstate Commerce Commission denied the applicability of the tariffs only on the basis of certain things done by the government, for whose benefit the transit tariffs were not put in effect.

Witness Brenner, employed by The Baltimore and Ohio Railroad Company, called by respondent railroads as an expert, testified that if the shipments involved had been commercial shipments, the transit tariffs would have been applicable (214a). Yet practically all of the reasons given by the Commission for its decision would have been equally applicable to commercial shipments, and, if valid, would completely destroy practically every application of a transit arrangement.

The Interstate Commerce Commission has described transit as "a commercial necessity". *Oklahoma Corporation Commission v. Abilene & Southern Ry. Co.*, 148 I. C. C. 316 (320 and 321). It is a practice of long standing. *Transit Case*, 24 I. C. C. 340 (348).

Can a Transit House Operator Be Denied the Benefit of Transit Tariffs on Shipments to Government Agencies Because of the Intention of the Government That the Shipment From the Transit Point Be Independent of the Inbound Shipment?

This Court and various Courts of Appeal have considered, many times, the questions involved in determining whether what appears to be two shipments, was, in law, one continuous shipment. It has been uniformly held that this question of continuity is to be decided on the facts with respect to the movement and not on any claimed intention of one of the persons involved. *United States v. Erie Railroad Company,* 280 U. S. 98; *Baltimore and Ohio S. W. R. R. Co. v. Settle,* 260 U. S. 166; *Southern Pacific Terminal Co. v. I. C. C.,* 219 U. S. 498; *Chicago, Milwaukee & St. Paul Ry. Co. v. Iowa,* 233 U. S. 334.

There is nothing in the contract of carriage that gives to the consignee of any shipment, whether it be a sale F. O. B. transit point or F. O. B. destination, and whether it be the Government or someone else, any control over the decision as to whether the shipment is a transit shipment or a new shipment from the transit point. The transit tariffs give this right only to the shipper or transit house operator.

Does the Transfer at the Transit Point of Title to the Goods Shipped Affect the Right of the Transit House Operator to the Benefit of the Transit Tariffs?

Transfer of title has repeatedly been held not to affect the continuous character of a movement. *I. C. C. v. Delaware, L. & W. R. Co.,* 220 U. S. 235; *Railroad Commission v. Worthington,* 225 U. S. 101; *Gulf, Colorado & Santa Fe Railway Co. v. Texas,* 204 U. S. 403; *Texas and N. O. R. Co. v. Sabine Tram Co.,* 227 U. S. 111; *Henry A. Klyce*

Company v. I. C. R. R., 19 I. C. C. 567; *Atchison, T. & S. F. Ry. Co. v. Harold*, 241 U. S. 371; and *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U. S. 498.

In *Friedman Co. v. Chesapeake and Ohio Ry. Co.*, 174 I. C. C. 273, the Interstate Commerce Commission said:

> "The decisions of the Supreme Court of the United States are plain that something more than a change in title is required to change the character of the movement. * * * The actual movement and the real character thereof are the determining elements."

Title to goods sold F. O. B. transit point, whether commercial or government, passes to the purchaser when loaded on cars at the transit point. *55 Corpus Juris* 959. *Commissioner of Internal Revenue v. East Coast Oil Company*, 85 F. (2d) 322; *United States v. R. P. Andrews & Co.*, 207 U. S. 229; *Amtorg Trading Corporation v. Higgins*, 150 F. (2d) 536; *Nelson Bros. Coal Co. v. Perryman-Burns Coal Co., Inc.*, 48 F. (2d) 99; *Higgins et al. v. California Prune and Apricot Growers, Inc.*, 16 F. (2d) 190.

Nowhere did the tariffs require the payment of the outbound freight charges by the transit house operator. The very idea was negatived by the alternative provisions of the tariffs, one permitting forwarding from the transit point at the balance of the through rate and the other permitting forwarding the shipment at the lawful rate from transit point to ultimate destination and filing a claim for refund for the excess. The purpose of these alternative provisions was to permit the transit house operator either to pass the saving along to his customer or to permit the customer to pay the local rate and the transit house operator to receive back the excess, thereby reducing his transportation costs.

This Court has held that the right to recover excess charges is not dependent on who bears the freight charges but on the contract of carriage. *Adams v. Mills,* 286 U. S. 397; *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.,* 245 U. S. 531; *L. & N. R. R. Co. v. Sloss Sheffield Steel & Iron Co.,* 269 U. S. 217.

Did the Government's Control Over the Shipments From the Transit Point or Its Lack of Interest in Shipments to the Transit Point Deprive the Transit House Operator of the Benefit of the Transit Tariffs?

The control which the government could exercise over these shipments was precisely the same as that of a commercial shipment. Once the cars left Mansfield the government could divert the cars to some other destination but so could a commercial consignee. The same thing is true of their lack of interest in the shipments from point of origin to transit point. Neither of them would care how the material arrived at Mansfield so long as the seller was able to deliver it there.

Was There Substantial Evidence to Support the Finding of the Interstate Commerce Commission?

A discussion of the evidence with respect to the claimed intention of the government would unduly lengthen this petition. Petitioner asserts, however, that there was no substantial evidence to support the finding of any such intention and that the evidence demonstrates conclusively that the government in fact had no intention which would affect the application of the transit tariffs. The undisputed testimony also shows that Petitioner performed exactly the same functions of a shipper as it would have performed on a commercial shipment and was, with the Government's knowledge and approval, and pursuant to the regulations of the Comptroller General, designated as

the shipper on each bill of lading. Lieutenant Dippold of the Navy Department, who issued these particular bills of lading, and who was called as a witness by respondent railroads, testified on direct examination that Petitioner was shown as the shipper on the bills of lading because "They are the actual shipper" (275a).

Section 6 (7) of the Interstate Commerce Act *requires* a carrier to charge tariff rates. Section 8 of the Act makes any carrier who charges more liable to the person damaged for the full amount of his damages. Section 9 permits any such person to bring suit in court or make complaint to the Interstate Commerce Commission. Section 13 sets forth the procedure to be followed and Section 16 (1) *requires* the Commission to award such damages as the complaining party has suffered.

What the Commission actually did in this case was to rewrite the tariffs on the basis of oral testimony as to what was intended by the government. It has ignored the principles which it should have followed in determining Petitioner's rights. It has not found any provision of the contract ambiguous or doubtful or requiring construction. It has in effect held that any shipment made on a government bill of lading to be excluded from the provisions of the transit tariffs despite the fact that the tariffs did not exclude them. Such a result should not have been tolerated by the District Court or the Court of Appeals. *Universal Camera Corporation v. N. L. R. B.,*

340 U. S. 474; *N. L. R. B. v. Pittsburgh Steamship Co.*, 340 U. S. 498. The importance of the questions involved warrants the granting of certiorari and the correction of these errors by this Court

GREAT LAKES STEEL CORPORATION

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APPENDIX 1

INTERSTATE COMMERCE COMMISSION

No. 29165[1]

GREAT LAKES STEEL CORPORATION

vs.

BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

Submitted April 10, 1946. Decided May 28, 1946.

1. In No. 29165, rates charged on iron and steel articles, in carloads, from points in Michigan, New York, and Rhode Island, stopped for fabrication in transit at Mansfield, Ohio, and the fabricated material shipped from Mansfield to destinations in various states, found not shown to have been inapplicable. Complaint dismissed.

2. Complaint in No. 29344, alleging that inapplicable rates were charged on lumber, in carloads, from points in West Virginia to Elkins, W. Va., there accorded transit services and reshipped to Atlantic and Pacific ports, dismissed upon agreement of the parties that the issue be controlled by our findings in No. 29165.

Harry D. Fenske and James McEvoy, Jr., for complainants in No. 29165. Walter S. Ryan for complainant in No. 29344 and intervener in No. 29165. F. H. Cole, Jr., Edward A. Kaier, and W. T. Pierson for defendants.

[1] This report also embraces No. 29344, W. H. Mason Lumber Co. v. Atlantic Coast Line Railroad Company, et al.

REPORT OF THE COMMISSION

DIVISION 2, Commissioners Mahaffie, Splawn, and Alldredge

BY DIVISION 2:

Exceptions were filed by complainant to the examiners' report, defendants replied, and the parties were heard in oral argument.

The complainant in the title proceeding alleges by complaint filed September 4, 1944, that the rates[2] charged for the transportation of iron and steel articles, in carloads, from points in Michigan, New York, and Rhode Island to Mansfield, Ohio, there fabricated, and the fabricated material shipped on government bills of lading from Mansfield to various destinations in the United States were unlawful in violation of Section 6 (7) of the Interstate Commerce Act. We are asked to require defendants to cease and desist from charging the assailed rates in the future, and to award reparation.

No. 29344 involves a similar allegation, and a request for reparation, with respect to numerous carloads of lumber from various points in West Virginia to Elkins, W. Va., there accorded transit services and reshipped to certain Atlantic and Pacific ports. No hearing has been held in No. 29344, but the parties have agreed that the determination of the issues shall be controlled by our findings in the title proceeding, in which the complainant intervened and participated in the oral argument.

---

[2] Rates will be stated in this report in cents per 100 pounds.

Our consideration of the facts necessarily is limited to those of record in the title proceeding. The shipments were made from Detroit and Jackson, Mich., and Jamestown, N. Y., to Mansfield, Ohio, on commercial bills of lading and the inbound charges were paid by complainant. The articles comprising the shipments were fabricated at Mansfield, and the fabricated articles were shipped from Mansfield on government bills of lading to naval bases, principally at Davisville, R. I., Gulfport, Miss., Port Hueneme, Calif., Norfolk, Va., and Lakeview, Wash. The fabricated material shipped from Mansfield had been purchased by the Navy Department f. o. b. cars at that point prior to the movement therefrom, and the charges from Mansfield, some of which were based on export rates and others on domestic rates, were paid and borne by the Navy Department. Some of the charges from Mansfield were based on Section 22 quotations and others were based on rates subject to land grant deductions.

The tariffs provided two methods by which the benefit of transit might be obtained. Under one method shipments from the transit point could be made at the balance of the applicable rate from the point of origin to the final destination. The alternate method provided for the payment of the rate from the transit point to the final destination and the filing of claims for refund of the difference between the applicable through rate and the sum of the local rates to and from the transit point. The transit rules required the selection of one of the above methods prior to the movement from the point of origin and did not permit the method to be changed after the movement began. Complainant elected to use the claim method, and filed claims with defendants for refunds of the differences between the through rates with transit at Mansfield, and the combinations of rates to and from the transit point,

plus the applicable transit charge of 3¼ cents. Defendants declined to pay the claims, and the complaint was filed.

The basis of complainant's claim is illustrated by the following examples. The rate from Detroit to Mansfield is 21 cents, and the export rate from Mansfield to Port Hueneme is 63 cents. Complainant paid and bore the rate of 21 cents and the Navy Department paid and bore the rate of 63 cents. The through export rate from Detroit to Port Hueneme with transit at Mansfield is 63 cents, plus a transit charge of 3¼ cents. Complainant claims that the applicable through rate, with transit at Mansfield was 63 cents, plus a 3¼ cents transit charge, and seeks a refund of 21 cents which is the rate it paid on the shipment from Detroit to Mansfield. The total charges assessed on shipments from Jackson to Davisville were based on rates of 21 cents from Jackson to Mansfield plus the export rate of 29 cents from Mansfield to Davisville. The through export rate from Jackson to Davisville, with transit at Mansfield, is 33 cents, plus a transit charge of 3¼ cents. On shipments to Davisville complainant seeks refund of 17 cents which would reduce to 4 cents the charge on the inbound shipment to Mansfield.

The question for determination in this proceeding is whether the movements to and from Mansfield were separate and independent shipments or constituted one continuous through movement under the provisions of the governing transit tariffs. The contents of the shipments from Mansfield were the property of the government as soon as they were loaded on the cars at that point, and the government was interested only in the transportation service from Mansfield. It was the purpose of the Navy Department to make new shipments from Mansfield, independent of the inbound movements.

When a shipper avails himself of applicable transit arrangements, the separate movements to and from the transit point are considered one continuous movement from point of origin through the transit point to the ultimate destination, regardless of the fact that the shipment is stopped, unloaded, and processed at the transit point and later reshipped therefrom. The theory of transit is that there is a continuous movement from point of origin to ultimate destination.

The continuity of the shipments under consideration was terminated at the transit point when the Navy Department, which became the owner of the goods when they were loaded on cars at Mansfield, elected to ship them from that point as separate and independent shipments. Control of the shipments from the transit point passed from complainant to the new owner (the Navy Department), who paid, or will pay, freight charges on the basis of the rates, as modified by Section 22 quotations or subject to land-grant deductions, from the transit point to final destinations. Complainant, having lost control of the goods, could not restore the continuity of the shipments, and is not entitled to readjustment of the charges on the basis of the through rates from the points of origin to the final destinations.

In a situation similar to that under consideration herein. DIVISION 2 found that shipments to and from the transit point were separate and distinct shipments and that the combination rates to and from the transit point were applicable. *Cudahy Packing Company v. Baltimore & Ohio Railroad Company,* 263 I. C. C. 503.

We find that the rates assailed in No. 29165 are not shown to have been inapplicable. The complaint therein and the complaint in No. 29344, will be dismissed.

APPENDIX 2

United States District Court
E. D. Michigan, S. D.

GREAT LAKES STEEL CORP.

v.

UNITED STATES ET AL.

No. 6295

September 29, 1953

Before: Honorable Arthur F. Lederle, Chief Judge.

This case was originally considered by a three-judge District Court, constituted as required by the revised Judicial Code, 28 U. S. C. A. 2321, *et seq.* The issues involved are sufficiently stated in the opinion of the Court in that case, *Great Lakes Steel Corp. v. United States, et al.*, 81 F. Supp. 450. It will be unnecessary to restate them at this time.

The complaint was originally dismissed for want of jurisdiction. The decision of this Court was reversed in *Great Lakes Steel Corp. v. United States, et al.*, 337 U. S. 952, in accordance with the ruling in *United States v. Interstate Commerce Commission*, 337 U. S. 426, and remanded to the District Court for determination of the merits of the allegations in the complaint. All of the evidence that the parties desired to submit was received during a pre-trial hearing prior to the original decision. Subsequent to the reversal and remand, the parties were permitted to submit further arguments.

The sole issue before the Court at this time is to determine whether the Commission's order is supported by substantial evidence. The sole function of the Court is to determine whether the Commission had acted within its authority. *Shields v. Utah Idaho Central Railroad Co.*, 305 U. S. 177, 185; *Interstate Commerce Commission v. Union Pacific Railroad Company*, 222 U. S. 541, 547-548; *Interstate Commerce Commission v. Inland Waterways Corp.*, 319 U. S. 671, 691.

The findings of the Commission are supported by substantial evidence, and there was no irregularity in the proceeding or error in the application of the rules of law. *Western Paper Makers' Chemical Company v. United States*, 271 U. S. 268, 271; *Skinner & Eddy Corporation v. United States*, 249 U. S. 557, 562; *New England Divisions Case*, 261 U. S. 184, 204; *Universal Camera Corp. v. Labor Board*, 340 U. S. 474.

It therefore follows that the complaint must be dismissed, with costs to be taxed.

Dated: September 29, 1953.

(Sgd.) Arthur F. Lederle,
Chief Judge.

APPENDIX 3

No. 12,189

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GREAT LAKES STEEL CORPORATION
A Delaware Corporation,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee,

INTERSTATE COMMERCE COMMISSION,
THE BALTIMORE AND OHIO RAILROAD COMPANY,
ERIE RAILROAD COMPANY, and
THE PENNSYLVANIA RAILROAD COMPANY,
Intervening Appellees.

ORDER

Before Allen, Martin and McAllister, Circuit Judges.

This case came on to be heard upon the record and briefs and oral argument of counsel;

And it appearing that the District Court afforded argument and reargument upon the case and carefully considered the record as a whole;

And it appearing that upon the record considered as a whole substantial evidence exists supporting the order of the Commission;

And it appearing that the District Court properly applied the applicable law. Cf. *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474:

It is ordered that the judgment of the District Court be and it hereby is affirmed.

Approved for entry:

.....
United States Circuit Judge.

No. 12,189

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GREAT LAKES STEEL CORPORATION
A Delaware Corporation,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee,
INTERSTATE COMMERCE COMMISSION,
THE BALTIMORE AND OHIO RAILROAD COMPANY,
ERIE RAILROAD COMPANY, and
THE PENNSYLVANIA RAILROAD COMPANY,
Intervening Appellees.

ORDER

Before Allen, Martin and McAllister, Circuit Judges.

The petition for rehearing is denied.

....
United States Circuit Judge.

APPENDIX 4

Interstate Commerce Act, 49 U. S. C. 1 et seq.

"§6, par. (7) * * * No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transportated by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; * * *."

* * * * *

"§8 * * * In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, * * *"

"§9. * * * Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United

States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. * * *"

* * * * *

"§13. * * * (1) * * * Any person, firm, corporation, * * * or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

* * * * *

"§16, par. (1). * * * If, after hearing on a complaint made as provided in section 13 of this title, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

* * * * *

"§22. * * * Nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal government, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the transportation of persons for the United States Government free or at reduced rates, or the issuance of mileage, excursion, or commutation passenger tickets; * * *"

APPENDIX 5

Administrative Procedure Act, 5 U. S. C. 1001 et seq.

"Judicial Review

"§1009. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

"(a) Right of Review—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"(b) Form and Venue of Proceedings—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court

of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

"(c) Acts Reviewable—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise required by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

* * * * *

"(e) Scope of Review—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action.

It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure

required by law; (5) unsupported by substantial evidence in any case subject to the requirements of Sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute, or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

34

No. 7[illegible]768

FILED
MAY 12 1955
HAROLD B. WILLEY, Clerk

No. 12189

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

GREAT LAKES STEEL CORPORATION, a Delaware Corporation,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee,

INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, ERIE RAILROAD COMPANY, and THE PENNSYLVANIA RAILROAD COMPANY,

Intervening Defendants-Appellees.

Appeal from the District Court of the United States for the Eastern District of Michigan, Southern Division

BRIEF FOR THE BALTIMORE AND OHIO RAILROAD COMPANY ET AL., INTERVENERS-APPELLEES

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FILED
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COUNTER-STATEMENT OF QUESTION INVOLVED

Does the record support the judgment of the District Court?

Appellees contend that the judgment should be affirmed for the reasons stated in the opinion.

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No. 12189

IN THE

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FOR THE SIXTH CIRCUIT

GREAT LAKES STEEL CORPORATION, a Delaware Corporation,

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UNITED STATES OF AMERICA,

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Intervening Defendants-Appellees.

Appeal from the District Court of the United States for the Eastern District of Michigan, Southern Division

---

BRIEF FOR THE BALTIMORE AND OHIO RAILROAD COMPANY ET AL., INTERVENERS-APPELLEES

COUNTER-STATEMENT OF FACTS

There are insufficiencies in appellant's Statement of Facts. Appellant in its brief, from pages 7 to 10, refers to material having to do with changes in the territorial provisions of the transit tariffs prior to the inception of operations at Mansfield. It is shown by reference to this material that these matters were handled between March of 1942 and August 25, 1942 (I. C. C. Exhibits 1 through

18, pages 294b through 314b, and I. C. C. Exhibits 24 to 28 inclusive, pages 321b through 328b).[1]

It is stated at page 10 of appellant's brief that at no time in this correspondence did any of the three railroads advise appellant that if the shipments moved outbound from Mansfield on Government bills of lading, the transit tariffs would not be applicable. Mr. Fenske, on behalf of appellant, stated of record (71a) that on August 27th he discussed matters with Mr. C. S. Williams—"and at that time we had established the fact, which hadn't been definitely known at that time, that the shipments were going to move out on United States Government bills of lading."

The first advice to the carriers about the use of Government bills of lading was by letter dated August 27, 1942, when appellant wrote to each of the three railroads at Mansfield (I. C. C. Exhibits 29, 30 and 31, 329b, 330b and 331b), in each of which letters it was stated:

> "The shipments will move into Mansfield on commercial bills of lading and it is likely the freight charges will be prepaid. The outbound move will be on government bills of lading with the freight charges collect. It is our understanding that under such an arrangement you will bill shipments forward at the rate applicable from Mansfield to destination and we can make claim for adjustment and refund of such portion of the inbound freight charges as is recoverable under the transit privilege through a claim statement submitted and supported by the properly recorded inbound freight bills. Please advise if our understanding is correct."

Appellant was promptly (August 31, 1942) advised that it was doubtful whether transit could be accorded under

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[1] Herein we refer to Appendix "A" of appellant's Brief, which consists of three volumes, by figure followed by letters "a," "b" or "c." The letter "a" refers to pages in the first volume; "b" to pages in the second volume, and "c" to pages in the third volume.

such circumstances (246a, and I. C. C. Exhibit 89, 531b). September 28, 1942, appellant was advised by the Erie that transit could not be accorded on business arriving on domestic bills of lading and forwarded on Government bills of lading (I. C. C. Exhibit 34, 336b). Mr. Fenske, who is Director of Transportation for appellant when so informed stated that he would go ahead with his proposed program on the assumption that the transit claims would be recognized (I. C. C. Exhibit 89, 531b and 246a).

Since this was the first transit operation by appellant (157a) it was necessary for them to become acquainted with the various records and forms, in order that they do what was insisted upon by Mr. Fenske—go ahead with the proposed program on the assumption that transit claims would be recognized (531b).

Appellant on Page 15 of its brief refers to first claims being returned because improperly prepared and stated that none of these letters returning the claims raised any question as to the applicability of respective transit tariffs. Note I. C. C. Exhibit 43, 361b wherein it was stated that it was necessary that evidence of the freight charges paid from the transit point to destination in the form of paid freight bills should be attached. See also I. C. C. Exhibit 44, 364b wherein it is stated that the claims should be supported with outbound bills of lading and freight bills showing complete rates. The transit tariffs provide two methods for settlement of charges where there is a transit operation. As to both methods it is provided that the inbound shipments will be charged on the basis of the lawful rate applicable to fabricating point. One method is by paying on the outbound shipment from the transit point the difference between the through rate from point of origin to ultimate destination and the rate paid from origin to transit point. The other method is the so-called "claim method." The tariffs require "when handled by

claim, outbound shipments will be charged the lawful rate and carload minimum weight (actual if greater) applicable from transit point to destination (I. C. C. Exhibit 64, Rule 12, 410b; I. C. C. Exhibit 68, Page 10, Rule K-35, 445b). It is recognized by appellant that "lawful" rate referred to in the tariff meant the tariff rate (145a).

Thereafter there was an attempt by appellant to convince the carriers that transit should be granted and the carriers denied that it should. Appellant held to its position and the carriers held to their position (115a).

On Page 19 of its brief appellant states that the evidence before the Commission conclusively establishes that "possession" of the structural steel fabricated by plaintiff at Mansfield was not delivered to the Government at that point. Appellant further states that the evidence conclusively establishes that the Navy Department did not ship the material from Mansfield.

The evidence shows that the Navy acquired title f. o. b. railroad cars at Mansfield (164a, 275a, 284a and 289a). All of the shipments involved moved from Mansfield on Government bills of lading (167a). The bill of lading contract (I. C. C. Exhibits 78 and 79, 478b and 479b) shows that the Government and the Railroads are the only contracting party and it provides that pre-payment of freight charges should not be demanded by the carrier, nor should collection be made from the consignee; that on presentation of the Government bill of lading, properly accomplished and attached to freight voucher prepared on the authorized Government form, to the office indicated on the face of the bill of lading, payment will be made by the Government to the last carrier, unless otherwise specifically stipulated.

The freight charges for the transportation service on the shipments from Mansfield were collected from the Government (168a and I. C. C. Exhibits 29 and 30, 31, 329b-

331b). The Government paid the charges for the shipments beyond Mansfield, some based on net land grant rates and others based on Section 22 quotations, whichever basis produced the lowest charge to the Government (168a, 207a, I. C. C. Exhibits 81 and 82, 482b through 486b), computed on the basis that Mansfield was the origin of the Government shipment (284a, 285a, 287a). The net rates to the Government would have been higher than the Government paid if Jackson or Detroit, Michigan, or Jamestown, New York were to be considered as the point of origin of the Government shipment (196a).

The outbound shipment from Mansfield, Ohio moved under Government bills of lading issued by the Navy Department, Bureau of Supplies and Accounts, and were furnished by the Navy to Great Lakes which assigned the bills to particular purchase orders (250a). The Navy furnished general routing provisions (161a, 252a) with consideration of the net rates to the Government on the traffic and the matter of land grant deductions (280a).

When the Government bills of lading were received by appellant they did show the appropriation chargeable, the name and title of the issuing officer and they bore the signature of such officer (250a, 109a and 110a).

Other items (filled in by the Navy before the Government bills of lading were sent to appellant) shows that the shipment was made under O. D. T. block permit QMR-NM-6600-00-N; that the freight charges were to be billed to the Navy Department, Bureau of Supplies and Accounts; that the appropriation chargeable was 1740811-40, Transportation of Things Navy-1944; that the issuing officer was the Bureau of Yards and Docks—Advance Base Division, Chicago, and that the name and title of the issuing officer was the Officer in Charge-Contracts N. O. Y. 8173 and N. O. Y. 8175. There is also a certicate of the issuing officer showing, as authority for the shipment, that it represents

matters under contract or purchase order I-C-12525, N. O. Y. 8175, dated August 22, 1944, shipped from Mansfield, O., as the f. o. b. point named in the referred-to contract or purchase order. The typewritten signature of the issuing officer is carried on the bill of lading (281a, 288a, 250a, 109a, 169a and 170a).

ARGUMENT

Does the Record Support the Judgment of the District Court? Appellees Contend That the Judgment Should Be Affirmed for the Reasons Stated in the Opinion.

HISTORY OF THE CASE

Proceedings Before the Interstate Commerce Commission

On September 4, 1944 the Great Lakes Steel Corporation, herein referred to as appellant, filed a complaint with the Interstate Commerce Commission docketed as No. 29165, copy of which is carried beginning at page 13a. Appellant alleged that it was engaged in the business of fabricating iron and steel articles at Mansfield, Ohio; that carload shipments of iron and steel articles had been and were being made by it from origin points in Michigan, New York and Rhode Island to Mansfield, Ohio, on which it paid and bore the freight charges; that after fabrication at Mansfield the articles were shipped from Mansfield on U. S. Government bills of lading to various U. S. Naval Bases, the Government paying the freight charges for transportation from Mansfield. Appellant further alleged that the charges made by the carrier, based upon the separate rates assessed and collected on the shipment to and from Mansfield, were illegal and unlawful and constituted overcharges

in violation of Section 6(7) [2] of the Interstate Commerce Act (49 U. S. C. A. Sec. 6[7]), to the extent that they exceeded the through rates applicable from the Michigan, New York and Rhode Island origins to ultimate destinations over routes via Mansfield. Appellant contended that such through rates were applicable by reason of certain transit privileges hereinafter discussed. The Commission was asked to find that the defendant railroads had assessed and collected illegal and unlawful rates and charges, and to award reparation for the overcharges.

There was a hearing before an Examiner of the Commission on June 1 and 2, 1945. At that hearing the evidence, carried from page 45a through page 292a, including the exhibits carried from page 294b through page 604b, was introduced. Each of the parties submitted briefs on October 1, 1945. A proposed report by two of the Commission's Examiners was issued in January of 1946, shown beginning at page 606c, in which proposed report it was recommended that the Commission dismiss the complaint upon a finding that the rates charged were applicable. Exceptions to this proposed report were filed by appellant in February of 1946 (615c). Appellees replied thereto in March of 1946 (651c). The case was orally argued before Division 2 of the Commission (Commissioners Mahaffie, Splawn and Alldredge) on April 10, 1946, the argument being carried beginning at page 668c. On May 28, 1946, Division 2 of the Commission issued the Report and Order here involved, which held against appellant's contentions (778c). Thereafter, appellant filed with the Commission a petition requesting reconsideration, rehearing and reargu-

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[2] So far as pertinent here, Section 6(7) provides ". . . nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time. . . ."

ment (726c). Appellees replied (756c). Appellant's petition was denied by an order of the entire Commission November 4, 1946 (775c).

Proceedings in the Courts

Appellant's present action to set aside, annul, and suspend the order of the Commission was filed January 13, 1947. Intervening defendants, in addition to answering on the merits, challenged the jurisdiction of the court, their contention being that appellant by proceeding before the Commission had exercised its right of election under Section 9 of the Interstate Commerce Act (49 U. S. Code, § 9) [3] and should not be permitted to pursue both remedies; namely (a) by first suing before the Commission, and (b) upon an unfavorable order, then attacking that order under the Urgent Deficiencies Act. The case was heard before a three-judge court November 4, 1948. Briefs and arguments discussed the merits as well as the jurisdictional questions. The decision of the District Court, dated December 22, 1948, is reported in 81 F. Supp. 450, and it turns wholly on the jurisdictional question of election of remedies.

The case was taken by direct appeal to the United States Supreme Court and that tribunal on June 27, 1949, reversed and remanded the case in a per curiam decision reported in 337 U. S. 952, reading as follows:

> "No. 749. *Great Lakes Steel Corp.* v. *United States, et al.* Appeal from the United States District Court for the Eastern District of Michigan. Per Curiam: Judgment reversed. *United States* v. *Interstate Commerce Commission,* 337 U. S. 426."

In the decision in *United States* v. *Interstate Commerce Commission,* upon the authority of which case the above

[3] Section 9, Title 49 U. S. C. carried in Appendix 2.

ruling was made, the court at page 433 in discussing the election-of-remedies contention, states:

> "The contention of the Commission and the railroads as to Sec. 9 is this. A shipper has an alternative. He may bring his action before the Commission or before the courts. But he must make an election. If he elects to 'bring suit' in a court and is unsuccessful, he retains the customary right of appellate review. If he elects to 'make complaint to' the Commission, as the Government did, and relief is denied, he is said to be barred by the statutory language of Sec. 9 from seeking any judicial review of the Commission order. Under the contention the order is final and not reviewable by any court even though entered arbitrarily, without substantial supporting evidence, and in defiance of law.
>
> "Such a sweeping contention for administrative finality is out of harmony with the general legislative pattern of administrative and judicial relationships. See e.g., *Shields* v. *Utah I. C. R. Co.*, 305 U. S. 177, 181-185; *Stark* v. *Wickard*, 321 U. S. 288, 307, 310. And this Court has consistently held Commission orders reviewable upon charges that the Commission had exceeded its lawful powers. See, e.g., *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91-93; *Chicago Junction* case, 264, U. S. 258, 266. The language of Sec. 9 does not suggest an abandonment of these consistent holdings."

The Court cites *Shields* v. *Utah I. C. R. Co.*, 305 U. S. 177, 181-185, as an example of the nature of judicial review which would still be available. In the *Shields* case, the Court at pages 184 and 185 states that the scope of the judicial review was limited to the question as to whether the Commission had acted within its authority, citing the leading cases on this question. Following the citations, the Court at page 185 states:

> "The condition which Congress imposed was that the Commission should make its determination after

hearing. There is no question that the Commission did give a hearing. Respondent appeared and the evidence which it offered was received and considered. The sole remaining question would be whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious. Id. That question must be determined upon the evidence produced before the Commission."

Following the remand to the District Court, briefs were filed by the parties and the case was argued before Hon. Arthur F. Lederle, Chief District Judge, July 28, 1950 (3a). The case of *Pittsburgh SS Co.* v. *N. L. R. B.*, 180 F. (2d) 731, had been decided by this court February 17, 1950, and a writ of certiorari had been granted by the Supreme Court May 8, 1950. This decision involved the question as to possible effect of the Administrative Procedure Act (5 U. S. C. sec. 1001 et seq.) and the Taft-Hartley Act (29 U. S. C. sec. 141 et seq.) upon the scope of judicial review of administrative orders. The decision of the Supreme Court in the *Pittsburgh Steam Ship Company* case was rendered February 26, 1951, the same day the court handed down its decision in *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474. Thereafter this proceeding was set for reargument before Judge Lederle, the reargument being held on June 25 and 26, 1953 (4a). The nature of court review of administrative orders and the same evidence and factual situation now brought to this court were all thoroughly discussed during this 2-day argument.

The District Court, in its opinion dated September 29, 1953 (806c-807c), states:

"The sole issue before the Court at this time is to determine whether the Commission's order is sup-

ported by substantial evidence. The sole function of the Court is to determine whether the Commission had acted within its authority. *Shields* v. *Utah Idaho Central Railroad Co.*, 305 U. S. 177, 185; *Interstate Commerce Commission* v. *Union Pacific Railroad Company*, 222 U. S. 541, 547-548; *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, 691."

"The findings of the Commission are supported by substantial evidence, and there was no irregularity in the proceeding or error in the application of the rules of law. *Western Paper Makers' Chemical Company* v. *United States*, 271 U. S. 268, 271; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 562; *New England Divisions Case*, 261 U. S. 184, 204; *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474."

"It therefore follows that the complaint must be dismissed, with costs to be taxed."

The case has been brought here by appeal.

Our Present Problem

The usual court review of orders of administrative agencies is before a District Court of three judges (Title 28, U. S. C. sec. 2325, 2284) [4] with direct appeal to the Supreme Court. (Title 49, U. S. C. sec. 45).[4] Or, as to Labor Board proceedings, by trial in the Court of Appeals with review by the Supreme Court (Title 29, U. S. C. sec. 160).[4]

For the reasons set out in *United States* v. *Interstate Commerce Commission, et al.*, 337 U. S. 426 at 441 et seq., this case was heard by a single judge District Court with appeal to the Court of Appeals. As to this proceeding, therefore, this court is in the same relative position as the Supreme Court would be in in the normal procedure involving judicial review of administrative orders.

And the question is whether the review already afforded fell short of that which is required, and whether the

[4] Statutes here cited are carried in Appendix 1.

District Court misapprehended or misapplied the proper judicial standard in holding that the Commission's order should not be set aside, *Radio Corp.* v. *United States,* 341 U. S. 412, 415, 420. In the case just cited the court also states at page 415:

> ". . . in considering the question of sufficiency of evidence to support an administrative order, this court must and does rely largely on a first reviewing court's conclusion. *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474."

In the following sections of this brief, we take up the question of just what is the proper extent of judicial review of orders of administrative agencies. We then review the evidence with a sufficient explanation of that evidence to show the significance of the individual matters.

JUDICIAL REVIEW OF ORDERS OF ADMINISTRATIVE AGENCIES

Following the passage of the Administrative Procedure Act, 5 U. S. C. A. sec. 1001 et seq., and the Taft-Hartley Act, 29 U. S. C. A. sec. 141 et seq., questions arose as to the effect of these Acts upon the scope of judicial review of orders of administrative agencies.

These questions were resolved by the United States Supreme Court in *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474 and *Labor Board* v. *Pittsburgh SS Co.,* 340 U. S. 498. The latter case reached the Supreme Court from the United States Court of Appeals for the Sixth Circuit. The decision of this Court of Appeals in the Pittsburgh Steam Ship Company case is reported in 180 Fed. (2d) 731. This court, as well as the Supreme Court, considered very fully the history of both enactments. In that history, it is shown that under the Wagner Act the Labor Board's orders were conclusive "if supported by

evidence." This led to the assumption that the requirements of the Wagner Act were met when the reviewing court could find in the record evidence which, when viewed in isolation, substantiated the Board's findings (*Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, 478). So contracted a reviewing power led to dissatisfaction with the Board's administration of the Wagner Act. There were proposals to enlarge the scope of review to permit inquiry whether the findings were supported by the weight of the evidence. It was noted that such a change would require courts to determine independently which way the evidence preponderates and administrative tribunals would be turned into little more than media for transmission of the evidence to the courts. (*Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, Note 12 on p. 480).

It is further shown in the history of these enactments as carried in the Supreme Court's decision (*Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, 481-484) that the change effectuated was the addition of the idea that the whole record was to be searched in the determination by the Court as to whether or not the findings of the Board were supported by substantial evidence. In the Taft-Hartley Act, it was provided: "The findings of the Board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." 29 U. S. C. A., sec. 160e.[5] And in the Administrative Procedure Act, Title 5, U. S. C. A. sec. 1009e,[5] it was provided that the court should hold unlawful and set aside agency action, findings and conclusions found to be unsupported by substantial evidence—and in making the determination the court shall review the whole record, or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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[5] Statutes cited shown in Appendix 5.

The Court of Appeals (180 Fed. [2d] 731, 733) stated that these statutes were designed to eliminate the wholesale use of heresay, the drawing of expert inferences not based upon evidence and the consideration of only one part or one side of the case.

Both the decision in the Court of Appeals and the Supreme Court recognize that this change in no sense enabled the courts to decide any case de novo (180 Fed. [2d] 731, 735; 340 U. S. 474, 488), and in the history of the changes it is made clear that, while suggestions were made that the scope of review be enlarged to the extent that the court might pass upon the weight of the evidence, these proposals were studiously avoided (See 340 U. S. 474, at page 485). Note particularly Senator Taft's explanation of the meaning of the legislation quoted in note at page 485 by the Supreme Court. Senator Taft said:

> "In the first place, the evidence must be substantial; in the second place, it must still look substantial when viewed in the light of the entire record. That does not go so far as saying that a decision can be reversed on the weight of the evidence. It does not go quite so far as the power given to a circuit court of appeals to review a district-court decision, but it goes a great deal further than the present law, and gives the court greater opportunity to reverse an obviously unjust decision on the part of the National Labor Relations Board." (93 Cong. Rec. 3839, reprinted in 2 Legislative History 1014.)

On pages 488 and 489 of the decision in the *Universal Camera Corporation* case, the Supreme Court states:

> "To be sure, the requirement for canvassing 'the whole record' in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of

those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.

"Congress has merely made it clear that reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

"There remains then the question whether enactment of these two statutes has altered the scope of review other than to require that substantiality be determined in the light of all that the record relevantly presents.

". . . Retention of the familiar 'substantial evidence' terminology indicates that no drastic reversal of attitude was intended."

In later decisions of the Supreme Court, citing the *Universal Camera Corporation* case, it is made clear that the findings of the Board are conclusive with respect to questions of fact when supported by substantial evidence on the record as a whole. *O'Leary* v. *Brown-Pacific-Maxon*, 340 U. S. 504 at 508. Here the Court states: ". . . the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole."

United States v. *Spector*, 343 U. S. 169 at 179. Here the Supreme Court states: ". . . any evidentiary attack raises only the question whether on the record as a whole there is substantial evidence in support of the order."

See also *National Labor Relations Board* v. *Denver Building & Construction Trades Council, et al.*, 341 U. S. 675, 691.

The Supreme Court has stated that it is well settled that orders of the Commission are final unless: (1) beyond the power which it could constitutionally exercise, or (2) beyond its statutory power; or (3) based upon a mistake of law; or (4) based on action so arbitrary as to fix rates contrary to evidence or without evidence to support it; or (5) lacks findings of the basic facts conditioning its power; or (6) authority has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow determines the validity of the exercise of the power. *I. C. C.* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547; *I. C. C.* v. *Ill. Central R. R.*, 215 U. S. 452, 470; *Kansas City So. Ry. Co.* v. *United States*, 231 U. S. 423, 440; *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361; *Board of Trade* v. *United States*, 314 U. S. 534, 546; *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, 352; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57, 62; *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 139 and 146; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481.

When resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Commerce Comm'n* v. *Illinois Central R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Comm'n* v. *Union Pacific R. Co.*, 222 U. S. 541. *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 139-140.

In *N. L. R. B.* v. *Southland Manufacturing Co.*, 201 Fed. (2d) 244, the court considers the *Universal Camera Corp.* case and at p. 247 states that the court does not attempt

to find the facts anew from the preponderance of the evidence, rather the court reviews the findings of the Board as it reviews the findings of a jury on a motion n. o. v., and the findings, like the verdict, must stand if there is substantial evidence in the record to support them.

Court review does not involve a trial de novo of the matters heard by the Commission. *N. L. R. B.* v. *Smith Victory Corp.*, 190 Fed. (2d) 56, 57; *C. Howard Hunt Pen Co.* v. *Federal Trade Commission*, 197 Fed (2d) 273, 278; *N. L. R. B.* v. *Poultry Enterprise*, 207 Fed. (2d) 522, 524. These three decisions all consider the *Universal Camera Corp.* case. See also *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 227.

In *N. L. R. B.* v. *Injection Molding Co.*, 211 Fed. (2d) 59, the court, after discussing the *Universal Camera Corp.* case, stated at page 62 that the court does not examine the evidence for the purpose of determining which contention is supported by the greater weight of the evidence, but in order to determine whether the evidence relied upon by the Board is substantial in relation to the whole.

To the effect that the court is not to consider the weight of the evidence, see also *Western Chem. Co.* v. *United States*, 271 U. S. 268, 271; *Chicago R. I. & P. Ry.* v. *United States*, 274 U. S. 29, 33; *Assigned Car Cases*, 274 U. S. 564, 580; *Warehouse Co.* v. *United States*, 283 U. S. 501, 508; *New England Divisions Case*, 261 U. S. 184, 204; *Florida* v. *United States*, 292 U. S. 1, 12; *Corn Products Co.* v. *Comm'n*, 324 U. S. 726, 739; *United States* v. *Pan American Corp.*, 304 U. S. 156, 158.

I. C. C. v. *Jersey City*, 322 U. S. 503, the Court at page 513 states:

> "So long as there is warrant in the record for the judgment of the expert body it must stand. . . . 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by

the administrative body.' *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 145-46; *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286-87."

The Court cannot substitute its judgment for that of the Commission even when there seems to be no dispute as to the facts. Any other rule would mean that ". . . the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action." *United States* v. *Louis. & Nash. R. R.,* 235 U. S. 314, 320, 321. See also *United States* v. *Chicago Heights Trucking Co.,* 310 U. S. 344, 352; *A. T. & T. Co.* v. *United States,* 299 U. S. 232, 236; *Security Adm'r* v. *Quaker Oats Co.,* 318 U. S. 218, 227; *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 304; *Florida* v. *United States,* 292 U. S. 1, 12; *Barrett Line* v. *United States,* 326 U. S. 179, 199.

In *Consolidated Royal Chemical Corporation* v. *Federal Trade Commission,* 191 Fed. (2d) 896, the court at the bottom of page 899 states: ". . . While the rule laid down in the *Universal Camera* Case requires us, in reviewing the action of an agency, to examine and consider the record as a whole, we are not required to substitute our view for the view of the Commission, when the Commission was confronted by two possible reasonable findings." See also *N. L. R. B.* v. *Nabors,* 196 Fed. (2d) 272, 275; *N. L. R. B.* v. *Nina Dye Works Co., Inc.,* 203 Fed. (2d) 849, 851; *N. L. R. B.* v. *Ozark Hardwood Co.,* 194 Fed. (2d) 963, 965; *Angwell Curtain Company* v. *N. L. R. B.,* 192 Fed. (2d) 899, 903, 904; *Radio Corp.* v. *United States,* 341 U. S. 412, 420; *United States* v. *Pierce Auto Lines,* 327 U. S. 515, 536.

In *Radio Officers* v. *Labor Board,* 347 U. S. 17 at p. 50, the court, after considering the amendment to section 10 (e) of the Labor Act and *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, states:

"There is nothing in the language of the amendment itself that suggests denial to the Board of power to draw reasonable inferences. It is inconceivable that the authors of the reports intended such a result for a fact-finding body must have some power to decide which inferences to draw and which to reject. We therefore conclude that insofar as the power to draw reasonable inferences is concerned, Taft-Hartley did not alter prior law."

"Congress entrusted the Board, not the courts, with the power to draw inferences from the facts." *Labor Board* v. *Link-Belt Co.*, 311 U. S. 584, 597. To same effect, see also *Labor Board* v. *Falk Corp.*, 308 U. S. 453, 461; *Labor Bd.* v. *Greyhound Lines*, 303 U. S. 261, 271; *Helvering* v. *Nat. Grocery Co.*, 304 U. S. 282, 294; *Labor Board* v. *Southern Bell Co.*, 319 U. S. 50, 60; *Corn Products Co.* v. *Comm'n*, 324 U. S. 726, 739; *United States* v. *Detroit Navigation Co.*, 326 U. S. 236, 241; *Cardillo* v. *Liberty Mutual Co.*, 330 U. S. 469, 477; *Trade Comm'n* v. *Staley Co.*, 324 U. S. 746, 760.

When there is adequate support in the evidence for inferences drawn by the administrative agency, the court may not substitute its judgment of the inferences to be drawn from that evidence for that of the agency: *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 156; *Palmer* v. *Commissioner*, 302 U. S. 63, 70; *Comm'r* v. *Scottish American Co.*, 323 U. S. 119, 125.

THERE WAS SUBSTANTIAL EVIDENCE

(1) It is conceded by appellant that shipments of iron and steel articles were made from origins in Michigan, New York and Rhode Island to Mansfield, Ohio on the usual commercial bills of lading, and appellant was shown as both the consignor and consignee on such bills of lading and paid the published tariff rates on such shipments. It

is so stated in appellant's complaint before the Interstate Commerce Commission (14a) and of record (84a and 85a).

(2) The inbound shipments of iron and steel articles received at Mansfield were fabricated into structural steel parts for building. These parts were sold to the Navy under prime or direct contracts pursuant to which the Navy acquired title F. O. B. railroad cars at Mansfield (679c, 15a, 164a, 275a, 284a).

(3) Under this sale F. O. B. Mansfield, the Government was to pay and did pay the freight charges on movements from Mansfield to destination. This, too, is shown in complaint by appellant before the Commission (15a) and it is conceded in their brief in this court at pages 43, 44 and 55.

(4) All of the shipments on which appellant sought to recover the alleged overcharges moved from Mansfield on Government bills of lading. Shipments were consigned to an officer of the Navy. Most of the shipments moved to Port Hueneme, Cal., Gulfport, Miss. or Davisville, R. I. (167a and 168a). The Government bill of lading (478b and 479b) shows that the Government and the railroads are the only contracting parties and it provides that prepayment of freight charges shall not be demanded by the carrier, nor shall collection be made from the consignee; that on presentation of the Government bill of lading, properly accomplished and attached to freight voucher prepared on the authorized government form, to the office indicated on the face of the Government bill of lading, payment will be made by the Government to the last carrier, unless otherwise specifically stipulated.

The Government bills of lading on the outbound shipments from Mansfield, Ohio were issued by the Navy Department to appellant, who assigned the bills to particular purchase orders (250a). The Government bills of lading show the appropriation chargeable, the name and title of

the issuing officer and bear the signature of such officer (250a). I. C. C. Exhibit 77, beginning at page 466b, consists of photostat copies of representative Government bills of lading under which these shipments moved (166a). Bill of lading N7428640 (469b) is illustrative of the Government bill of lading. There is a space in the bill of lading showing in print "From (shipping point)" which has been filled in to show Mansfield, O., and a space headed "From (full name of shipper)" which has been filled in to show "Great Lakes Steel Corporation, Stran-Steel Div." The shipment was consigned to the Supply Officer for Officer in Charge of Construction, U. S. Naval Advance Base Depot, in care of Contractors N. O. Y. 8175, at Davisville, R. I. The bill of lading shows that pick-up service was not availed of at origin by the Government or its agent, and that it covers 80 crates of beams n.o.i.b.n. iron or steel (transit) and was marked "For export." The items above referred to were filled in by Great Lakes (109a, 110a, 288a). Other items (filled in by the Navy before the billing was sent to Great Lakes) shows that the shipment was made under O. D. T. block permit QMR-NM-6600-00-N; that the freight charges were to be billed to the Navy Department, Bureau of Supplies and Accounts; that the appropriation chargeable was 1740811-40, Transportation of Things Navy—1944; that the issuing officer was the Bureau of Yards and Docks—Advance Base Division, Chicago, and that the name and title of the issuing officer was the Officer in Charge-Contracts N. O. Y. 8173 and N. O. Y. 8175. There is also a certificate of the issuing officer showing, as authority for the shipment, that it represents matters under contract or purchase order 1-C-12525, N. O. Y. 8175, dated August 22, 1944, shipped from Mansfield, O., as the f. o. b. point named in the referred-to contract or purchase order. The typewritten signature of the issuing officer is carried on the bill of lading (109a, 110a, 288a).

(5) The Government paid the freight charges on the shipments beyond Mansfield, some of which were based upon net land-grant[6] rates and others based on Section 22 quotations,[7] whichever basis produced the lowest charges to the Government (172a and 207a). The Government was interested only in the transportation service from Mansfield, which was the origin of the Government shipments (284a and 285a).

THE SIGNIFICANCE OF THE EVIDENCE IN ORDER TO SHOW ITS SUBSTANTIALITY

1. Transit.

The correct tariff charges for separate shipments to and from Mansfield are higher than the published through tariff rates which apply to a through shipment from Michigan, New York and Rhode Island origins to the ultimate destinations here involved. Appellant's position before the Commission and the courts has been that the separate inbound and outbound shipments, here involved, should be treated for rate application purposes as continuous through shipments under the fiction of transit. Appellant further contends that such through shipments should be regarded as having been made by it. It will be seen as we progress, that appellant would have to prevail as to both of these contentions, whereas neither is correct.

The rate situation is illustrated by the following quotation from the Commission's decision (780c).

> "The basis of complainant's claim is illustrated by the following examples. The rate from Detroit to

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[6] Land grant roads under an obligation to furnish transportation to the Government at reduced rates. This was required by Title 10, U. S. C., Sec. 1375, quoted in Appendix 4. See also *So. Ry. Co.* v. *U. S.*, 322 U. S. 72, 73-74.

[7] Section 22 (Title 49, U. S. C. Sec. 22, carried in Appendix 2) quotations are special quotations which the carriers are permitted to make under the Interstate Commerce Act for the handling of property "for the United States."

Mansfield is 21 cents, and the export rate from Mansfield to Port Hueneme is 63 cents. Complainant paid and bore the rate of 21 cents, and the Navy Department paid and bore the rate of 63 cents. The through export rate from Detroit to Port Hueneme with transit at Mansfield is 63 cents, plus a transit charge of 3¼ cents. Complainant claims that the applicable through rate, with transit at Mansfield, was 63 cents, plus a 3¼ cents transit charge, and seeks a refund of 21 cents which is the rate it paid on the shipment from Detroit to Mansfield. The total charges assessed on shipments from Jackson to Davisville were based on rates of 21 cents from Jackson to Mansfield plus the export rate of 29 cents from Mansfield to Davisville. The through export rate from Jackson to Davisville, with transit at Mansfield, is 33 cents, plus a transit charge of 3¼ cents. On shipments to Davisville complainant seeks refund of 17 cents which would reduce to 4 cents the charge on the inbound shipment to Mansfield."

Appellees took the position before the Commission, with which position the Commission agreed, that the shipments by appellant from origins in Michigan, New York and Rhode Island to Mansfield, and the shipments by the Navy under Government bills of lading from Mansfield, were separate and distinct and that the rates collected were legally applicable. The Government, as the owner of the property F. O. B. railroad cars at Mansfield, and as the one responsible for the payment of the charges therefrom, elected to make new shipments from Mansfield in order that it be accorded charges modified by net land grant rates and Section 22 quotations, available solely to the Government. By so doing, the Government defeated the possibility of considering the separate shipments to and from Mansfield as being but parts of a continuous through movement.

A reference to the nature and theory of transit will be helpful in understanding the conclusion reached by the Commission that the charges collected were legally applicable.

"Transit" has been defined by the Commission in *Cottonseed, Its Products, and Related Articles,* 188 I. C. C. 605, 646, as:

> "the right of a shipper to stop at an intermediate point and change the form or substance of the commodity shipped, and afterwards reship the commodity so changed to point of final destination at a total charge for transportation not exceeding that which would have been applied if the changed commodity had been shipped from point of origin to final destination without being stopped in transit, sometimes with an additional charge for extra services performed at the transit point and at other times without any charge in addition to the through rate."

In *Memphis Merchants Exchange* v. *I. C. R. R. Co.,* 43 I. C. C. 378, the Commission at page 388 stated that the question whether or not shipments were subject to through rates under the fiction of transit must be determined by the essential character of the commerce, governed by the intent of the parties controlling the movement and that this intent must be ascertained from all the facts, circumstances and conditions pertaining to the traffic. At page 388, the Commission states:

> "It must be apparent, however, that in the case of traffic moving under transit tariffs providing for proportional or reshipping rates and other facilities or arrangements, dependent in their applicability upon a prior or subsequent movement to or from the transit point, the intent of the parties must be measured not merely by the intent of one of the parties at the time and place of shipment, but we must look to the fully ripened and completed intent as expressed and

> executed by the party controlling the movement of the traffic, whether it be the original consignor or consignee or the owner, who may be neither the original consignor nor consignee."

Continuing, the Commission makes it clear that the completed intent might not exist until the one who controls the traffic finally determines what is to be done with the shipment. At page 389 the Commission further states:

> "Manifestly, the shipper, consignee, or owner of a shipment cannot treat the different stages or steps of the completed movement of the traffic as a single unit for some purposes and as separable or local movements, in part, for other purposes."

In *Reduced Rates on Returned Shipments,* 19 I. C. C. 409, at page 417, the Commission stated that transit was susceptible of defense only on the theory that the inbound and outbound movements are in fact parts of a single continuous transaction, stating further:

> "Once let it be conceded that the inbound and outbound movements are separate and distinct and the impropriety of applying any rates other than the regularly established locals would be self-evident."

This quoted statement was again made by the Commission in *Red River Oil Co.* v. *T. & P. Ry. Co.,* 23 I. C. C. 438, at 446. See also *Lawrenceville Cooperage Co.* v. *Akron, C. & Y. R. Co.,* 226 I. C. C. 773, 786.

In *Lake Charles Rice Milling Co., Inc.* v. *Brimstone R. & C. Co.,* 197 I. C. C. 1, the Commission at page 13 states that shippers are not required to use transit where it is available, and cites the *Memphis Merchants Exchange* case, *supra,* as authority for the position that the inherent nature of the movement is governed by the intent of the parties, which is to be ascertained from all of the facts,

circumstances and conditions pertaining thereto, and the intent is not to be governed merely by the intent of one of the parties, but it is to be governed by the fully ripened and completed intent as expressed and executed by the party controlling the movement, whether that may be the original consignor, consignee or owner. This matter was again considered in *Arkansas Rice Traffic Bureau* v. *Aberdeen & R. R. Co.*, 219 I. C. C. 5, where the Commission calls attention to the fact that the same contentions were made in the *Lake Charles Rice Milling Co.* case, *supra*, and at page 30 adheres to the findings made in the prior proceeding.

In *Illinois Grain to Chicago*, 40 I. C. C. 124, the carriers contended that where the shippers had recorded their inbound billing, a definite intention was shown on the part of the shippers to make a through shipment. The Commission, however, held that by recording the billing on inbound movements for transit, the shipper simply protected his right to avail himself either of the privilege of making a transit movement or local movement. Following such a recording of the inbound freight bill, the shipper could still elect to make a separate, independent, outbound shipment at the local outbound rate; and it was held here that the shipments in and out were separate. See also *Merchants Exchange of St. Louis* v. *B. & O. R. R.*, 34 I. C. C. 341, 353. It has been recognized that transit is optional and that the parties may either use transit or make separate shipments in and out. See *Washburn Crosby Co.* v. *Chicago, B. & Q. R. Co.*, 206 I. C. C. 649, 654; and *Northern Milling Co.* v. *Chicago & N. W. Ry. Co.*, 237 I. C. C. 235, 236.

We come now to the problem necessarily faced by the Government, who purchased these goods f. o. b. Mansfield and who was responsible for and did pay the freight charges therefrom. As the unqualified owner and as the

one responsible for the payment of the charges, the Government did have the unrestricted right to make such disposition of the goods as it desired. It could have localized the goods at Mansfield or it could have transported the goods beyond Mansfield in Government-owned vehicles, or arranged for transportation by means of vehicles in common or private carrier service. If any of these alternatives had been exercised by the Government, no question of rate overcharges and refund to appellant could possibly have arisen. Likewise, the Navy could, if it so desired, have made entirely new and independent shipments by railroad from Mansfield at rates applicable locally from Mansfield, and thus defeat the exercise of transit privileges and make impossible the fiction of continuous transportation subject to the payment of through rates.

2. The Governments Made New and Independent Shipments from Mansfield.

In all of appellant's arguments in this case, it has not questioned the fact that the Government did have sufficient connection with these shipments from Mansfield so as to become entitled to whatever special rates the railroads accorded to the Government.

In order that the Government could secure the advantage of the special rates which were accorded it, it was necessary that the transportation be "for the United States" (Title 49 U. S. Code, Sec. 22).[8] By the Code of Federal Regulations, Title 4, Sec. 8.5, transportation for the United

[8] Title 49, U. S. C. A., Sections 6(1), 3(1), 2, and 22 require common carriers to file and keep open schedules of rates and not to make or collect from any person a greater or less compensation for any service than is charged or demanded from any other person for doing a like and contemporaneous service. The common carriers are prohibited from extending to any shipper any privilege except in accordance with the tariff. The only exception is the provision of Section 22 providing that freight may be transported "for the United States, state, or municipal governments, at free or reduced rates." See also *Ill. Cent.* v. *United States*, 265 U. S. 209, and *Louis. & Nash. R. R.* v. *United States*, 267 U. S. 395. Statutes here cited are carried in Appendix 2.

States requires a certificate of issuing officer on the Government bill of lading, it being provided:

> "This certificate will be filled out by the government officer controlling a shipment of government property by a contractor from an f. o. b. point named in the contract to the designated point of delivery before said officer issues the bill of lading set of forms to the contractor for accomplishment by him as consignor."

The Attorney General has ruled (Vol. 40, Opinion No. 90, May 15, 1945):

> "Where a contracting officer for the Government has authorized a shipment to be made on a government bill of lading and the shipment is so made, the Government alone is liable for the freight charges. . . . In such case, the transaction clearly falls within the term 'freight transported for the United States' as used in Section 3(2) of the Interstate Commerce Act."

Lt. Dippold was the officer who signed the certificate which made the government bill of lading an authorized document and evidenced the fact that the transportation was being performed for the payment of freight charges by the Government (284a). He testified that it was the aim and desire of the Government to make separate, distinct, and new shipments from Mansfield, independent of any transportation matters that may be connected with the inbound movement (279a, 280a, 284a). He issued the Government bills of lading here involved (274a). He stated that the Government was interested only in the transportation service from Mansfield (284a, 285a) and in the freight charges from Mansfield (287a). The Navy furnished blanket routes for the shipments (252a, 274a) bearing in mind in those instructions the matter of possible land-grant deductions which the Government might have available (280a). While appellant strenuously argues about

the value of Lt. Dippold's testimony, it must be recognized that the Government, in order to secure any privileges available only to the Government, necessarily had to make a government shipment from Mansfield. Lt. Dippold was the officer through whom the arrangements were made to be certain that the Government could secure what privileges were available to it. We have not only the evidence of the officer who handled the details to effectuate the plans and intent on the part of the Government, but the evidence shows the carrying out of those plans and intent.

The question as to whether through shipments were effectuated or separate shipments made, depends upon the intent of the parties measured by the fully ripened and completed intent as expressed and executed by the party controlling the movement of the traffic—whether that be the original consignor or consignee or the owner. *Memphis Merchants Exchange* v. *I. C. R. R. Co.*, 43 I. C. C. 378, 388, *Lake Charles Rice Milling Co., Inc.* v. *Brimstone R. & C. Co.*, 197 I. C. C. 1, 13.

Transit is based on the theory that the inbound and outbound movements are but parts of a single continuous transaction. *Reduced Rates on Returned Shipments*, 19 I. C. C. 409, 417; *Capital Warehouse Co.* v. *Director General*, 66 I. C. C. 683, 685. Transitted shipments are through shipments from origin to destination. *Stickel & Son* v. *P. R. R.*, 151 I. C. C. 364, 366; *Brabston* v. *L. & N.*, 176 I. C. C. 421, 423.

Admittedly the shipments from the origin points in Michigan, New York, and Rhode Island, to Mansfield were commercial shipments. The Government did not become concerned with the movement until it secured title f. o. b. cars at Mansfield. In order for the Government to become entitled to any of the rights and privileges, which only it could secure, it was necessary that the movement enjoying such rights and privileges be a movement, as shown above,

"for the United States." Were we to attempt to consider the commercial shipment to Mansfield and the governmental shipment from Mansfield as parts of a through shipment—a single unit—it is apparent that we would have neither an entirely commercial unit nor an entirely governmental unit. It is shown of record (220a, 221a, 223a) that a through commercial shipment from Detroit or Jackson, Michigan, via Mansfield to Port Hueneme, California, would have been subject to a tariff rate of $1.48. Due solely to the fact that the shipments from Mansfield were shipments "for the United States," the Government under Section 22 quotations became entitled to a rate of 63 cents. Due solely to the fact that the shipments from Mansfield to Gulfport were "for the United States," the Government became entitled to the use of net land-grant rates, and if the origin of Government shipments to Gulfport had been either Detroit or Jackson, Michigan, or Jamestown, New York, the net land-grant rates to the Government would have been higher than it paid from Mansfield (196a).

Throughout the proceedings before the Commission, appellant urged, as it does here, that it was the shipper of the goods from Mansfield. It may be shown by the bill of lading or otherwise that the shipper named therein was not acting on his own behalf. See *L. & N. R. R. Co.* v. *Central Iron Co.*, 265 U. S. 59, at 67, and *Agricultural Lands, Inc.* v. *Pan Handle & S. F. Ry. Co.*, 60 Fed. Supp. 108 at 109-110. A shipper has been defined as one who exercises direct control of the shipment. *United States* v. *Metropolitan Lumber Co.*, 254 Fed. 335, 346, and as the "owner of person for whose account the carriage of goods is undertaken." *Compagnie Generale Transatlantique* v. *American Tobacco Co.*, 31 Fed. (2d) 663, 667.

In *L. & N. R. R. Co.* v. *United States*, 267 U. S. 395, the court considers a case where coal had been purchased by

the Government at origin under a contract providing that it would furnish the bills of lading and pay the freight charges. The court states at page 399:

> ". . . the contract required shipment in carload lots on forms of bills of lading furnished by the contracting officer, and bound the United States to pay freight charges from the mine to Mobile. This meant that the contractor was not to be concerned with or responsible for transportation by rail."

The facts show that the Government was—and necessarily—the shipper from Mansfield, but in addition we call attention to the fact that the rule set out in *Memphis Merchants Exchange* v. *I. C. R. R. Co.*, 43 I. C. C. 378, 388, and in *Lake Charles Rice Milling Co.* v. *Brimstone R. & C. Co.*, 197 I. C. C. 1 at 13, makes it clear that the question of whether through shipments were effectuated or separate shipments made depends upon the intent of the parties measured by the fully ripened and completed intent, as expressed and executed by the party *controlling the movement of the traffic,* whether that be the original consignor, or consignee, or owner. We believe it patent that the Government as owner f. o. b. did *control the movement from Mansfield.*

3. There Is Sufficient Evidence of the Government's Intent and the Results Accomplished by Carrying Out That Intent.

The best test of the Government's intent is what it actually did. In *Radio Officers* v. *Labor Board*, 347 U. S. 17 at 45, the Court states:

> "This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common law rule that a man is held to intend the foreseeable consequences of his conduct.

Cramer v. *United States,* 325 U. S. 1, 31; *Nash* v. *United States,* 229 U. S. 373, 376; *United States* v. *Patten,* 226 U. S. 525, 539; *Agnew* v. *United States,* 165 U. S. 36, 50."

The Government's intent to make new and independent shipments from Mansfield is established by the fact that it arranged for the movement from Mansfield on Government bills of lading, that it secured title F. O. B. cars at Mansfield, and that the charges on all the shipments from Mansfield were settled by the Government on the basis of Government net land grant rates or as modified by Section 22 quotations (207a). Appellant admits that movements to Gulfport were at net land grant rates (see its brief in this court at page 63). Appellant questions the fact that special rates were accorded the Government under Section 22 quotations to the West Coast. The export rate of 63 cents from Mansfield to Port Hueneme was applicable under the tariffs only upon compliance with the regulations carried in Exhibit 80, carried at page 480b, with which conditions none of these shipments complied (171a). Appellant admits that these shipments did not comply with those rules. (See page 62 of its brief here.)

The case of *Peden Iron & Steel Co.* v. *T. & N. O. R. R. Co.,* 264 I. C. C. 769, 268 I. C. C. 562, is determinative that failure to comply with regulations such as carried in Exhibit 80 makes inapplicable the export rates conditioned thereon. See also *Mack Mfg. Corp.* v. *Alton & S. R. Co.,* 263 I. C. C. 331; *International-Stacy Corp.* v. *Chesapeake & O. Ry. Co.,* 262 I. C. C. 349.

Appellant misconstrues this *Peden* case. (Its brief beginning at page 62.) It is specifically shown in the second report (268 I. C. C. 562, 563) that the export rate there involved, 44 cents, would have applied on the shipments in issue if those shipments had complied with regulations similar to those carried in Exhibit 80. Due solely to the

fact that such regulations were not complied with, the domestic rate became applicable. The issue in that case was the reasonableness of the domestic rate, in view of the circumstances and conditions applying to the traffic. It was under this issue that the Commission then considered what should be fixed as a reasonable rate, and decided not upon 44 cents, the export rate if there had been compliance, but upon 74 cents. It is thus clear from the *Peden* case that failure to comply with regulations such as carried in Exhibit 80 makes inapplicable a rate depending upon such provisions. The further fact that upon non-compliance with those provisions, the Commission fixed a rate substantially higher than the export rate applicable where the conditions were complied with, demonstrates that the Government did secure a distinct advantage through the Section 22 quotations which enabled it to use the export rate of 63 cents in spite of non-compliance with the provisions carried in Exhibit 80.

At the time the movements here involved were made, the domestic rate from Mansfield to the West Coast was $1.27 (I. C. C. Exhibit 84, 516b, 196a). The net land-grant rate to the Government, if the Government used this rate, would have been 79.896 cents (196a). The rate accorded the Government from Mansfield to the West Coast under the Section 22 quotations was 63 cents. If this 63 cent rate could be considered a tariff rate, or a rate which was available to or which could in any way be used by appellant, the charge which the railroads could have collected from the Government from Mansfield to the West Coast would have been only 39.971 cents per cwt (194a).

Title 10, U. S. C. Section 1375 provides:

> "Payment shall be made at such rates as the Secretary of War shall deem just and reasonable and shall not exceed 50 per centum of the full amount of compensation, computed on the basis of the tariff or lower

special rates for like transportation performed for the public at large, for the transportation of property or troops of the United States over any railroad which under land-grant acts was aided in its construction by a grant of land on condition that said railroad shall be and remain a public highway for the use of the United States, and for which adjustment of compensation is required in accordance with decisions of the Supreme Court construing such land-grant acts, or over any railroad which was aided in its construction by a grant of land on condition that such railroad should be a post route and military road, subject to such regulations as Congress may impose restricting the charge for such Government transportation, and such payment shall be accepted as in full for all demands for such service." (June 7, 1924, c. 291, Title I, 43 Stat. 486.)

This section makes it clear that if the 63 cent rate were a tariff rate or a rate available for like transportation performed for the public at large, the Government itself could then have applied its land-grant deductions to that rate.

Conversely, since land-grant rates and the special Section 22 quotations were accorded to the Government for the movement beyond Mansfield, this commercial shipper could not use any such special charges. It is unlawful to permit special rates accorded to the Government to accrue to any party other than the Government itself. *Givens* v. *L. & N. R. R. Co.*, 140 I. C. C. 605, 606; *Henry H. Cross Co.* v. *United States*, 133 Fed. (2d) 183, 186-187.

THE COMMISSION'S DECISION

The question before the Commission and one dispositive of all the issues raised, was whether there was evidence of record from which the Commission might conclude, as it did, that the shipments to and from Mansfield, Ohio were separate and distinct shipments and that, therefore, the rates assessed and collected were those legally applicable.

If the Government, as the owner of the goods and as the party responsible for the payment of the freight charges beyond Mansfield, treated the movement from Mansfield as separate and distinct from the inbound shipment to Mansfield, then these separate shipments could not be united by operation of the transit tariffs, or by any other theory in order to create the fiction of continuous through transportation for which through rates from origins to ultimate destinations would be applicable in lieu of the charges properly applicable to the individual shipments. On this point see again, *Memphis Merchants Exchange* v. *I. C. R. Co.*, 43 I. C. C. 378, 389, where the Commission states:

> "Manifestly, the shipper, consignee, or owner of a shipment cannot treat the different stages or steps of the complete movement of the traffic as a single unit for some purposes and as separate or local movements, in part, for other purposes."

The Commission's conclusions, as stated in its report of May 28, 1946, 264 I. C. C. 779, 781 (778c at 781c) are as follows:

> "The question for determination in this proceeding is whether the movements to and from Mansfield were separate and independent shipments or constituted one continuous through movement under the provisions of the governing transit tariffs. The contents of the shipments from Mansfield were the property of the government as soon as they were loaded on the cars at that point, and the government was interested only in the transportation service from Mansfield. It was the purpose of the Navy Department to make new shipments from Mansfield, independent of the inbound movements.
>
> "When a shipper avails himself of applicable transit arrangements, the separate movements to and from the transit point are considered one continuous movement from point of origin through the transit point

to the ultimate destination, regardless of the fact that the shipment is stopped, unloaded, and processed at the transit point and later reshipped therefrom. The theory of transit is that there is a continuous movement from point of origin to ultimate destination. The continuity of the shipments under consideration was terminated at the transit point when the Navy Department, which became the owner of the goods when they were loaded on cars at Mansfield, elected to ship them from that point as separate and independent shipments. Control of the shipments from the transit point passed from complainant to the new owner (the Navy Department), who paid, or will pay, freight charges on the basis of the rates, as modified by section 22 quotations or subject to land-grant deductions, from the transit point to final destinations. Complainant, having lost control of the goods, could not restore the continuity of the shipments, and is not entitled to readjustment of the charges on the basis of the through rates from the points of origin to the final destinations.

"In a situation similar to that under consideration herein, division 2 found that shipments to and from the transit point were separate and distinct shipments and that the combination rates to and from the transit point were applicable. *Cudahy Packing Company* v. *Baltimore & Ohio Railroad Company*, 263 I. C. C. 503.

"We find that the rates assailed in No. 29165 are not shown to have been inapplicable. The complaint therein, and the complaint in No. 29344, will be dismissed."

THE COMMISSION'S CONCLUSION THAT THE SHIPMENTS TO AND FROM MANSFIELD, OHIO, WERE SEPARATE AND DISTINCT FOR RATE APPLICATION PURPOSES, MADE IT UNNECESSARY TO CONSIDER OR DECIDE OTHER MATTERS PRESENTED

Since the Commission found that the shipments to and from Mansfield were separate and distinct, a consideration

of the details of the transit rules was not necessary to a decision of the Commission in this case. However, the record shows that these rules (contrary to the contention of appellant) were not complied with.

These tariffs require payment of the *lawful* rate to the transit point and, when handled under the claim method, provide that the outbound shipment will be charged the *lawful* rate and on settlement of the claim an adjustment made on the basis of the "*lawful* through rate." (See Rule 12, I. C. C. Exhibit 64 [410b] and Rule K-35, I. C. C. Exhibit 63 [455b]). Appellant contends that "lawful" rates per these tariffs should be considered to include the special charges accorded the Government under Section 22 quotations or under the land-grant provisions. The Elkins Act provides that the tariff rate shall be conclusively deemed to be the *lawful* rate (49 U. S. Code, Sec. 41, paragraphs 1 and 2).[9] *Armour Packing Co.* v. *United States*, 209 U. S. 56 at page 69, outlines the developments leading up to the enactment of the Elkins Act and shows the purpose Congress had in mind in providing that the tariff rate shall be conclusively deemed to be the *lawful* rate. See also *Louis. & Nash. R. R. Co.* v. *Maxwell*, 237 U. S. 94, 97; *Pittsburgh etc. Ry. Co.* v. *Fink*, 250 U. S. 577, 581. The Commission has also made it clear that the tariffs established in a lawful manner state the rates that are "legally applicable under Section 6 of the Act." *Bacon Bros.* v. *Ala. Great So. Ry. Co.*, 263 I. C. C. 587, 590.

The case of *Thompson* v. *Baltimore & O. R. Co.*, 59 F. Supp. 21, considers both the net land grant rates and Section 22 quotations to the Government. The Court at page 35 states:

> "Land grant rates are not filed 'with the Commission' and no requirement of the Act above referred

[9] Statute carried as Appendix 3.

to has ever been applied, nor do we understand the parties hereto are contending it should be applied to land grant rates. Section 6(3) of the Act provides:

"'*No change shall be made in the rates,* fares, and charges *or joint rates,* fares, and charges which *have been filed and published by any common carrier in compliance with the requirements of this Section, except after thirty days' notice to the Commission and to the public published as aforesaid,* which . . . and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. . .'."

"Neither the carriers nor the Commission have ever held that this section applies to land grant rates."

At page 37, the court quotes from Conference Ruling No. 208(e) with the emphasis we show here:

"(e) Section 22 of the act authorizes carriers to grant free or reduced-rate transportation of property for the United States, state, or municipal governments, or for charitable purposes or for exhibitions at fairs or expositions. It also authorizes free or reduced-fare transportation of certain specified persons. This *special provision and the words 'reduced rates' are construed to be special authority for carriers to depart from established tariff or fares;* and for such transportation as is provided for in said section 22 it is not necessary for carriers *to provide tariffs or observe tariff rates or fares and regulations,* etc."

Transit tariffs must be strictly complied with in order to obtain the transit basis. *Transit on Vegetable Oils in Southern Territory,* 197 I. C. C. 705, 712; *Absorption of Drayage & Trucking Charges,* 197 I. C. C. 675, 687.

Moreover, Great Lakes paid the freight charges on the shipments to Mansfield and the Government paid the freight charges on the shipments from Mansfield. It is well settled by many decisions of the Commission that

reparation will not be awarded where claimant has paid only a portion of the total freight charges involved. *Atlas Lbr. Co.* v. *Baltimore & O. R. Co.*, 256 I. C. C. 67, 70; *Hauser Packing Co.* v. *Atchison, T. & S. F. Ry. Co.*, 220 I. C. C. 356, 360; *Liberty Hide & Fur Co.* v. *Atchison, T. & S. F. Ry. Co.*, 188 I. C. C. 763, 766.

Other questions mentioned by appellant in its argument were thoroughly dealt with in the progress of this case before the Commission. For example, the effect of *Cudahy Packing Co.* v. *B. & O. R. R. Co.*, 263 I. C. C. 503, was discussed in appellant's petition for reconsideration (733c) and in appellees' reply (753c); the effect of appellant ordering and loading the cars and paying any demurrage which might accrue in view of the sale to the Government f. o. b. Mansfield, was discussed in appellant's exceptions to the proposed report (625c) and in appellees' reply (656c et seq.); the matter of appellant putting "transit" on the bills of lading is considered in their exceptions to the proposed report (627c) and in the petition for reconsideration (736c), and answered in appellees' reply to the exceptions (660c) and more fully in appellees' reply to the petition for reconsideration beginning at 767c, where it is pointed out that the circumstances do not show a situation of estoppel, and that the assessment of freight charges could not be affected by considerations of estoppel.

We ask that the court consider this referred to material in connection with appellant's comments.

THE DISTRICT COURT HAS ALREADY ACCORDED FULL AND PROPER JUDICIAL REVIEW

As shown in our Statement of the Case, *supra*, the first decision of the District Court in this case turned wholly upon the jurisdictional question of election. The Supreme Court reversed upon the authority of *United States* v.

I. C. C., 337 U. S. 426, in which decision it is made clear that although appellant had the choice of initiating its complaint either before the Commission or court, his election to go before the Commission still left open the right to question in court whether the order of the Commission had been entered arbitrarily, without substantial supporting evidence, and in defiance of law. As shown in our discussion of judicial review of orders of administrative agencies, *supra*, the range of issues opened to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisite of proof can be raised.

Following the remand, the District Court was very careful that it give proper consideration to this proceeding, subjecting the case to two arguments, one on July 20, 1950 and a later argument on June 25 and 26, 1953, following the decision in *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474.

The evidence in this case has been considered by two of the Commission's examiners (606c), by Division 2 composed of three Commissioners (668c), by the entire Commission (775c), and by the District Court (806c). The same contentions are made here as have been made before the Commission and as were made in the District Court. This can be seen by examining Vol. 3 of the Appendix of appellant's brief and considering appellant's exceptions to the proposed report of the Examiners (615c), appellees' reply to those exceptions (651c), appellant's petition for reconsideration (730c) and appellees' reply (756c).

We call attention again to *Radio Corp.* v. *United States*, 341 U. S. 412, at page 415 where the court states:

> ". . . in considering the question of sufficiency of evidence to support an administrative order, this court must and does rely largely on a first reviewing court's conclusion. *Universal Camera Corp.* v. *Labor Board*,

> 340 U. S. 474. The present case, however, need not be returned for further scrutiny below because we are convinced that the review already afforded did not fall short of that which is required."

and to page 420, where the court states:

> "We cannot say the District Court misapprehended or misapplied the proper judicial standard."

The case was within the jurisdiction of the Commission. There was a full hearing, with ample opportunity to be heard. There is substantial evidence and the action of the Commission cannot be deemed either arbitrary or capricious.

Rather than any showing of unlawfulness, appellant in substance does but ask this court to reach a conclusion different from that reached by the Commission upon the *same* evidence considered and weighed by the Commission. As we show in the discussion under the heading "Judicial Review of Orders of Administrative Agencies," supra, such action is beyond the scope of judicial review. The evidence and principles of law referred to, *ante*, demonstrate that there was substantial evidence to support the order of the Commission and that no error of law was committed.

Appellant points to no error committed by the District Court.

CONCLUSION

We believe we have made it clear that the District Court was correct in its opinion where it finds that the findings of the Commission are supported by substantial evidence, and that there was no irregularity in the proceedings or error in the application of the rules of law.

We submit that the decision of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX 1

Title 28, U. S. C., Sec. 2284, so far as pertinent reads as follows:

> "2284. In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:
>
> "(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding."

Title 28, U. S. C., Sec. 2325 reads as follows:

> "2325. An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 970."

Title 29, U. S. C., Section 160, so for as pertinent reads as follows:

> "160. . . .
>
> (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia,

by filing in such a court a written petition praying that the order of the Board be modified or set aside."

Title 49, U. S. C., Sec. 45 reads as follows:

"45. In every civil action brought in any district court of the United States under sections 1-7 of Title 15, chapters 1, 8, and 12 of this title, or any other Acts having a like purpose that may be hereafter enacted, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court. Feb. 11, 1903, c. 544, § 2, 32 Stat. 823; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; June 9, 1944, c. 239, 58 Stat. 272; June 25, 1948, c. 646, § 17, 62 Stat. 989."

APPENDIX 2

Title 49, U. S. C., Section 2 reads:

"If any common carrier subject to the provisions of this chapter shall directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

Title 49, U. S. C., Section 3(1) reads:

"It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Title 49, U. S. C. Section 6(1), so far as here pertinent reads:

"(1) Schedule of rates, fares, and charges; filing and posting. Every common carrier subject to the pro-

visions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee."

Title 49, U. S. C. Sec. 9 reads:

"Remedies of persons damaged; election; witnesses: Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before

which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

Title 49, U. S. C. Section 22, so far as here pertinent reads:

"Nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the transportation of persons for the United States Government free or at reduced rates. . . ."

APPENDIX 3

Title 49, U. S. C. Section 41, paragraphs 1 and 2 read as follows:

"(1) Anything done or omitted to be done by a corporation common carrier, subject to chapter 1 of this title, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under sections 41, 42, or 43 of this title, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in chapter 1 of this title or by sections 41, 42, or 43 of this title, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to chapter 1 of this title to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than

$1,000 nor more than $20,000: *Provided,* That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title, or of chapter 1 of this title, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

"(2) In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of chapter 1 of this title, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under sections 41, 42 or 43 of this title, shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section."

APPENDIX 4

Title 10, U. S. C., Section 1375 reads as follows:

"Charges for transportation by land-grant railroads subject to regulation by Congress. Payment shall be made at such rates as the Secretary of War shall deem just and reasonable and shall not exceed 50 per centum of the full amount of compensation, computed on the basis of the tariff or lower special rates for like transportation performed for the public at large, for the transportation of property or troops of the United States over any railroad which under land-grant acts was aided in its construction by a grant of land on condition that said railroad shall be and remain a public highway for the use of the United States, and for which adjustment of compensation is required in accordance with decisions of the Supreme Court construing such land-grant acts, or over any railroad which was aided in its construction by a grant of land on condition that such railroad should be a post route and military road, subject to such regulations as Congress may impose restricting the charge for such Government transportation, and such payment shall be accepted as in full for all demands for such service."

APPENDIX 5

Taft-Hartley Act,

Title 29, U. S. C. Section 160e, so far as here pertinent reads:

> "The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), wihin any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

Administrative Procedure Act.

Title 5, U. S. C., Section 1009e reads as follows:

"So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

26/35

Office - Supreme Court, U. S.
FILED
JUN 6 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. [redacted]68

GREAT LAKES STEEL CORPORATION, a Delaware corporation,

Petitioner,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, ERIE RAILROAD COMPANY, and THE PENNSYLVANIA RAILROAD COMPANY,

Respondents.

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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, ERIE RAILROAD COMPANY, and THE PENNSYLVANIA RAILROAD COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

(Figures followed by letter "a," "b" or "c" in parenthesis refer to pages of Appendix "A" to Petitioner's brief in the Court of Appeals for the Sixth Circuit which constituted the entire record in the District Court and consists of three volumes. The pages of the three volumes are numbered consecutively as follows: Volume I—Pages 1a through 292a; Volume II—Pages 293b through 604b; Volume III—Pages 605c through 808c.)

STATEMENT OF THE CASE

Proceedings before the Interstate Commerce Commission.

On September 4, 1944, the Great Lakes Steel Corporation, herein referred to as Petitioner, filed a complaint with

the Interstate Commerce Commission docketed as No. 29165 (13a et seq.). Petitioner alleged that it was engaged in the business of fabricating iron and steel articles at Mansfield, Ohio; that carload shipments of iron and steel articles had been and were being made by it from origin points in Michigan, New York and Rhode Island to Mansfield, Ohio, on which it paid and bore the freight charges; that after fabrication at Mansfield the articles were shipped from Mansfield on U. S. Government bills of lading to various U. S. Naval Bases, the Government paying the freight charges for transportation from Mansfield. Petitioner further alleged that the charges made by the carrier, based upon the separate rates assessed and collected on the shipments to and from Mansfield, were illegal and unlawful and constituted overcharges in violation of Section 6(7)[1] of the Interstate Commerce Act [49 U. S. C., Sec. 6(7)], to the extent that they exceeded the through rates applicable from the Michigan, New York and Rhode Island origins to ultimate destinations over routes via Mansfield. Petitioner contended that such through rates were applicable by reason of certain transit privileges hereinafter discussed. The Commission was asked to find that the defendant railroads had assessed and collected illegal and unlawful rates and charges, and to award reparation for the overcharges.

There was a hearing before an Examiner of the Commission on June 1 and 2, 1945. At that hearing the evidence, carried from page 45a through 292a, including the exhibits carried from page 294b through page 604b, was introduced. Each of the parties submitted briefs on October 1, 1945. A proposed report by two of the Commis-

[1] So far as pertinent here, Section 6(7) provides ". . . nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time. . . ."

sion's Examiners was issued in January of 1946 (606c), in which it was recommended that the Commission dismiss the complaint upon a finding that the rates charged were applicable. Exceptions to this proposed report were filed by Petitioner in February of 1946 (615c. Respondents replied thereto in March of 1946 (651c). The case was orally argued before Division 2 of the Commission (Commissioners Mahaffie, Splawn and Alldredge) on April 10, 1946 (668c). On May 28, 1946, Division 2 of the Commission issued the Report and Order here involved, which held against Petitioner's contentions (778c, 264 I. C. C. 779). Thereafter, Petitioner filed with the Commission a petition requesting reconsideration, rehearing and reargument (726c). Respondents replied (756c). Petitioner's petition was denied by an order of the entire Commission November 4, 1946 (775c).

Proceedings in the Courts.

Petitioner's action to set aside, annul and suspend the order of the Commission was filed January 13, 1947. The complaint (5a) alleged:

(a) that the order of the Commission was contrary to law, and

(b) wholly unsupported by substantial competent evidence and contrary to the evidence before the Commission,

(c) that the evidence shows conclusively that plaintiff is entitled to the payment of its claims for refund filed pursuant to the transit tariffs involved,

(d) that the conclusion of the Commission that plaintiff "having lost control of the goods, could not restore the continuity of the shipments," and was therefore "not entitled to readjustment of the charges on the basis of the through rates" is not supported by the

evidence, is contrary to the evidence and does not give effect to the express provisions of the tariffs in question,

(e) that the inference in the report of the Commission that the Navy was the shipper of said articles from plaintiff's plant at Mansfield is unsupported by the evidence and is contrary to all the evidence and is immaterial to the decision,

(f) that said order is arbitrary in that:

(i) it is not based upon adequate findings of fact and conclusions of law,

(ii) it disregards the evidence before the Commission,

(iii) it is based upon an erroneous and improper construction of the transit tariffs in issue,

(iv) it fails to give proper effect to the express terms and conditions of said tariffs,

(g) that said order is a violation of plaintiff's rights under Section 6(7) of the Interstate Commerce Act.

Respondent railroads in addition to answering on the merits, challenged the jurisdiction of the court, on the ground that Petitioner by proceeding before the Commission had exercised its right of election under Section 9 of the Interstate Commerce Act (49 U. S. C., Sec. 9)[2] and should not be permitted to pursue both remedies (a) by first suing before the Commission and (b) upon an unfavorable order, then attacking that order under the Urgent Deficiencies Act. The case was heard before a three-judge court on November 4, 1948. The decision of the District Court dated December 22, 1948, is reported in 81 F. Supp. 450, and it turns wholly on the jurisdictional question, the court dismissing the case for want of jurisdiction.

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[2] Section 9, Title 49 U. S. C. carried in Appendix 1.

The case was taken by direct appeal to this Court, and on June 27, 1949, it reversed and remanded the case in a per curiam decision reported in 337 U. S. 952, reading as follows:

> "No. 749. *Great Lakes Steel Corp.* v. *United States, et al.* Appeal from the United States District Court for the Eastern District of Michigan. *Per Curiam:* Judgment reversed. *United States* v. *Interstate Commerce Comm'n,* 337 U. S. 426. Mr. Justice Frankfurter, Mr. Justice Jackson, and Mr. Justice Burton dissent for reasons stated in the dissenting opinion in *United States* v. *Interstate Commerce Comm'n,* 337 U. S. 426, 444."

In the decision in *United States* v. *Interstate Commerce Commission,* upon the authority of which the above ruling was made, this Court held that the administrative order was subject to court review and that actions challenging the Commission's orders denying reparation should be heard by a one-judge court.

Following the remand to the District Court, briefs were filed by the parties, and the case was argued before Hon. Arthur F. Lederle, Chief District Judge, July 28, 1950 (3a). The case of *Pittsburgh S. S. Co.* v. *National Labor Relations Board,* 180 F. (2d) 731, had been decided February 17, 1950, and a writ of certiorari had been granted by this Court May 8, 1950. This decision involved the question as to possible effect of the Administrative Procedure Act (5 U. S. C., Sec. 1001 et seq.) and the Taft-Hartley Act (29 U. S. C., Sec. 141 et seq.) upon the scope of judicial review of administrative orders. The decision of this Court in *Labor Board* v. *Pittsburgh Steamship Co.,* 340 U. S. 498, was rendered February 26, 1951, the same day the court handed down its decision in *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474. Thereafter this pro-

ceeding was set for reargument before Judge Lederle, the reargument being held on June 25 and 26, 1953 (4a).

The District Court, in its opinion dated September 29, 1953, 115 F. Supp. 31 (806c-807c), states:

> "The sole issue before the Court at this time is to determine whether the Commission's order is supported by substantial evidence. The sole function of the Court is to determine whether the Commission had acted within its authority. *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, 185, 59 S. Ct. 160, 83 L. Ed. 111; *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 547-548, 32 S. Ct. 108, 56 L. Ed. 308; *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, 691, 63 S. Ct. 1296, 87 L. Ed. 1655.
>
> "The findings of the Commission are supported by substantial evidence, and there was no irregularity in the proceeding or error in the application of the rules of law. *Western Paper Makers' Chemical Company* v. *United States*, 271 U. S. 268, 271, 46 S. Ct. 500, 70 L. Ed. 941; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 562, 39 S. Ct. 375, 63 L. Ed. 722; *New England Divisions Case* (*Akron, C. & Y. R. Co.* v. *U. S.*), 261 U. S. 184, 204, 438 S. Ct. 270, 67 L. Ed. 605; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456.
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> "It therefore follows that the complaint must be dismissed, with costs to be taxed."

The case was appealed to the Court of Appeals for the Sixth Circuit, and on February 12, 1955, that Court entered an order reading as follows:

> "Before ALLEN, MARTIN and McALLISTER, Circuit Judges.
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> This case came on to be heard upon the record and briefs and oral argument of counsel;
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> And it appearing that the District Court afforded argument and reargument upon the case and carefully considered the record as a whole;

And it appearing that upon the record considered as a whole substantial evidence exists supporting the order of the Commission;

And it appearing that the District Court properly applied the applicable law. Cf. *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474:

IT IS ORDERED that the judgment of the District Court be and it hereby is affirmed.

Approved for entry:

United States Circuit Judge"

Petitioner states that the essential point at issue is the error of the Court of Appeals and the District Court in refusing to set aside the order of the Interstate Commerce Commission contending that the lower courts have not answered the questions involved except by general denial.

Respondents show herein that the findings of the Commission are supported by substantial evidence on the record considered as a whole, that there was no error of law and that the courts below have properly fulfilled their obligation in this attack upon the Commission's order.

Furthermore, respondents contend that this is not the type of case warranting the issuance of a writ of certiorari.

The facts are referred to in our Argument.

SUMMARY OF ARGUMENT

Judicial Review of Orders of Administrative Agencies.

The courts below properly fulfilled their function in the review of this order of the Interstate Commerce Commission. When resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commis-

sion's order becomes incontestable. *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 139-140; *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474; *Shields* v. *Utah, I. C. R. Co.*, 305 U. S. 177, 181-185.

There Was Substantial Evidence.

Petitioner made shipments of iron and steel articles from origins in Michigan, New York and Rhode Island to Mansfield, on which it paid the freight charges (85a). After fabrication into parts for steel buildings, the parts were sold to the Navy under prime or direct contracts, the Navy acquiring title f.o.b. railroad cars at Mansfield (671c, 679c, 164a, 275a, 284a). The Government paid the freight charges on the shipments beyond Mansfield (15a, 624c), some of which were based upon net land-grant rates and others based on Section 22 quotations, (both of which types of charges are available only to the Government and not to private shippers) whichever basis produced the lowest charge to the Government (172a, 241a, 242a, 207a). The Government was interested only in the freight charges from Mansfield (287a). All of the shipments from Mansfield moved on government bills of lading (167a). The bill of lading (478b, 479b, 208a, 269a) shows that the Government and the railroads are the only contracting parties, and it provides that pre-payment of freight charges shall not be demanded by carrier, nor shall collection be made from consignee; that on presentation of the government bill of lading, properly accomplished and attached to freight voucher prepared on authorized form to the office indicated on the face of the bill of lading, payment will be made by the Government to the last carrier. The issuing officer of these bills of lading (274a, 281a) testified that new ship-

ments were intended from Mansfield (279a). There is a certificate of the issuing officer on the bill of lading showing as authority for the shipment, that it represents matters under contract or purchase order 1-C-12525, N. O. Y. 8175, dated August 22, 1944, shipped from Mansfield, Ohio as the f.o.b. point named in the referred-to contract or purchase order.

The Significance of the Evidence in Order to Show Its Substantiality and That There Was No Error of Law.

a. TRANSIT.

The legally applicable charges for separate shipments to and from Mansfield were and are higher than the published through tariff rates which apply to through shipments from Michigan, New York and Rhode Island origins to ultimate destinations here involved. Petitioner contends that the separate inbound and outbound shipments here involved, should be treated for rate application purposes as continuous through shipments under the fiction of transit. Petitioner also contends that such through shipments should be regarded as having been made by it. As we show, Petitioner would have to prevail as to both of these contentions, whereas neither is correct.

Transit rests upon the fiction that the incoming and outgoing transportation services constitute a continuous shipment from point of origin to final destination. *Central R. R. Co.* v. *United States*, 257 U. S. 247, 257.

The question whether or not the shipments are subject to through rates under the fiction of transit, must be determined by the essential character of the commerce governed by the intent of the parties controlling the movement. The intent of the parties must be measured not merely by the intent of one of the parties at the time and place of shipment, but to the fully ripened and completed intent as expressed and executed by the party controlling the move-

ment of the traffic, whether it be the original consignor or consignee or the owner, who may be neither the original consignor, or consignee. *Memphis Merchants Exchange* v. *I. C. R. R. Co.*, 43 I. C. C. 378 at 388.

Transit can be defended only on the theory that the inbound and outbound movements are in fact parts of a continuous transaction.

> "Once let it be conceded that the inbound and outbound movements are separate and distinct and the impropriety of applying any rates other than the regularly established locals would be self-evident."

Reduced Rates on Returned Shipments, 19 I. C. C. 409, 417; *Great Northern Ry. Co.* v. *Commodity Credit Corp.*, 77 Fed. Supp. 780, 787. Transit is optional and the parties may either use transit or make separate shipments in and out. *Washburn Crosby Co.* v. *Chicago, B. & Q. R. Co.*, 206 I. C. C. 649, 654; *Northern Milling Co.* v. *Chicago & N. W. Ry. Co.*, 237 I. C. C. 235, 236.

b. The Government Made New and Independent Shipments from Mansfield.

In order that the Government could secure the advantage of the special rates which were accorded it from Mansfield, it was necessary that the transportation be "for the United States." (See Title 49, U. S. C., Sec. 22 and Sections 6(1), 3(1) and 2, Appendix 1.) Title was secured by the Government f.o.b. cars Mansfield, and it arranged for the movement therefrom on government bills of lading, and the charges on the shipments from Mansfield were settled by the Government modified by net land-grant rates or Section 22 quotations (207a). Net land-grant rates were paid on the shipments to Gulfport (241a, 242a). Rates based on Section 22 quotations were paid on shipments to the West Coast (212a, 171a, 480b, 482b, 483b, 208a, 269a). It was

admitted that the movement beyond Mansfield was of material that was being carried for the Government (681c). The Government shipment from Mansfield was that nature of shipment considered in *Louisville & Nashville R. R.* v. *United States,* 267 U. S. 395, where at page 399 the court states:

> "... the contract required shipment in carload lots on forms of bills of lading furnished by the contracting officer, and bound the United States to pay freight charges from the mine to Mobile. This meant that the contractor was not to be concerned with or responsible for transportation by rail."

See also Opinions of the Attorney General, Vol. 40, Opinion No. 90, May 15, 1945. The Government intended to make new shipments from Mansfield (279a), and was interested only in the transportation service from Mansfield (284a, 285a), and in the freight charges from Mansfield (287a). It is unlawful to permit special rates accorded to the Government to accrue to any party other than the Government. *Givens* v. *L. & N. R. R. Co.,* 140 I. C. C. 605, 606; *Henry H. Cross Co.* v. *United States,* 133 Fed. (2d) 183, 186-187.

There Is No Merit in Petitioner's Contentions.

Our outline of the evidence shows that there was substantial evidence supporting the findings of the Commission. There is no holding by the Commission that transfer of title itself interrupted the continuous character of shipment, and no holding which would prevent application of the tariffs to all shipments made on government bills of lading. The Commission found, as a fact, that it was the purpose of the Navy as new owner, to make new shipments from Mansfield, and further found that control of the shipments passed from petitioner to that new owner, who paid

the freight charges on the basis of rates modified by Section 22 quotations or subject to net land-grant deductions from Mansfield to destination. One completing a through shipment under transit would necessarily have paid the tariff charges from Mansfield. (See Rule 12, Exhibit 64, 410b, 151a, 269a, and Rule K-35, Exhibit 68, 445b, 151a, 269a, and *Armour Packing Co.* v. *United States,* 209 U. S. 56, 69, and the Elkins Act, Title 49, U. S. C., Sec. 41, carried in Appendix 2.) The nature of the shipment by the Government depends upon its contract and shipping arrangements. Cf. *Louisville & Nashville R. R. Co.* v. *United States,* 267 U. S. 395, and *Illinois Central R. R.* v. *United States,* 265 U. S. 209. Land-grant rates and Section 22 quotations are not tariff rates. *Thompson* v. *Baltimore & O. R. Co.,* 59 Fed. Supp. 21, 35-37. The point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, and its findings on that question will not be disturbed by the courts if supported by evidence. *United States* v. *Wabash R. Co.,* 321 U. S. 403, 408.

Certiorari Should Be Denied.

Certiorari is granted only in cases involving principles of public interest as distinguished from that of the parties, or to work out a conflict of opinion and authority between courts of appeal. *Labor Board* v. *Pittsburgh S. S. Co.,* 340 U. S. 498, 502; *Forsyth* v. *Hammond,* 166 U. S. 506, 513; *Magnum Co.* v. *Coty,* 262 U. S. 159, 163. A case involving reparations is not a case involving public interest. See *United States* v. *Interstate Commerce Commission,* 337 U. S. 426, at pages 441, 442 and 443, outlining the reasons why an attack upon an order of the Commission involving reparations should be considered by a one-judge rather than a three-judge court.

Certiorari is not granted merely to review the evidence or inferences drawn from it. *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178; *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502; *Radio Corp.* v. *United States*, 341 U. S. 412, 415; *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 491. It must be a strong case in which this Court will set aside concurrent findings of two lower courts. *Goodyear Co.* v. *Ray-O-Vac Co.*, 321 U. S. 275, 278.

ARGUMENT

Judicial Review of Orders of Administrative Agencies.

Petitioner alleges that the District Court filed an opinion which completely failed to discuss any of the important questions involved, and by doing so, so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of the supervision of a superior court. Petitioner further states that the departure was made complete when the Court of Appeals, without opinion, affirmed the action of the District Court. These contentions can only be made from a misunderstanding of the province and obligation of the court upon review of the Commission's order. The courts below properly fulfilled their function in reviewing this order of the Interstate Commerce Commission.

Following the passage of the Administrative Procedure Act, 5 U. S. C., Sec. 1001 et seq., and the Taft-Hartley Act, 29 U. S. C., Sec. 141 et seq., questions arose as to the effect of these Acts upon the scope of judicial review of orders of administrative agencies. These questions were resolved by this Court in *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, and *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498. The latter case reached the Supreme Court from the United States Court of Appeals for the Sixth Circuit. The decision of the Court of Appeals is reported in 180 Fed. (2d) 731.

The Supreme Court, as did the Court of Appeals, recognized that the courts were not to decide any case de novo [180 Fed. (2d) 731, 735; 340 U. S. 474, 488], and in the discussion of what changes were made it is made clear that, while suggestions were made that the scope of review be enlarged to the extent that the court might pass upon the weight of the evidence, these proposals were not accepted (see 340 U. S. 474, at page 485).

It is made clear in the *Universal Camera Corporation* decision, 340 U. S. 474, 488, 489, that the Administrative Procedure Act and the Taft-Hartley Act had not altered the scope of judicial review other than to require that substantiality be determined in the light of all that the record relevantly presents.

In later decisions of this Court, citing the *Universal Camera Corporation* case, it is made clear that the findings of the Board are conclusive with respect to questions of fact when supported by substantial evidence on the record as a whole. *O'Leary* v. *Brown-Pacific-Maxon*, 340 U. S. 504 at 508; *Labor Board* v. *Denver Bldg. Council, et al.*, 341 U. S. 675, 691; *United States* v. *Spector*, 343 U. S. 169, 179.

When resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 139-140.

To the effect that the Court is not to consider the weight of the evidence, see *Western Chem. Co.* v. *United States*, 271 U. S. 268, 271; *Chicago, R. I. & P. Ry.* v. *United States*, 274 U. S. 29, 33; *Assigned Car Cases*, 274 U. S. 564, 580;

Warehouse Co. v. *United States,* 283 U. S. 501, 508; *New England Divisions Case,* 261 U. S. 184, 204; *Florida* v. *United States,* 292 U. S. 1, 12; *Corn Products Co.* v. *Commn.,* 324 U. S. 726, 739; *United States* v. *Pan American Corp.,* 304 U. S. 156, 158.

In *Interstate Commerce Commission* v. *Jersey City,* 322 U. S. 503, the Court at page 513 states:

> "So long as there is warrant in the record for the judgment of the expert body it must stand. . . . 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 145, 146; *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286-87."

Courts cannot substitute their judgment for that of the Commission even when there seems to be no dispute as to the facts. Any other rule would mean that ". . . the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action." *United States* v. *Louis. & Nash. R. R.,* 235 U. S. 314, 321. See also *United States* v. *Chicago Heights Trucking Co.,* 310 U. S. 344, 352; *A. T. & T. Co.* v. *United States,* 299 U. S. 232, 236; *Security Admr.* v. *Quaker Oats Co.,* 318 U. S. 218, 227; *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 304; *Florida* v. *United States,* 292 U. S. 1, 12; *Barrett Line* v. *United States,* 326 U. S. 179, 199.

In *Radio Officers* v. *Labor Board,* 347 U. S. 17 at p. 50, the court, after considering the amendment to section 10(e) of the Labor Act and *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, states:

> "There is nothing in the language of the amendment itself that suggests denial to the Board of power to

> draw reasonable inferences. It is inconceivable that the authors of the reports intended such a result for a fact-finding body must have some power to decide which inferences to draw and which to reject. We therefore conclude that insofar as the power to draw reasonable inferences is concerned, Taft-Hartley did not alter prior law."

"Congress entrusted the Board, not the courts, with the power to draw inferences from the facts." *Labor Board* v. *Link-Belt Co.*, 311 U. S. 584, 597. To same effect, see also *Labor Board* v. *Falk Corp.*, 308 U. S. 453, 461; *Labor Bd.* v. *Greyhound Lines*, 303 U. S. 261, 271; *Helvering* v. *Nat. Grocery Co.*, 304 U. S. 282, 294; *Labor Board* v. *Southern Bell Co.*, 319 U. S. 50, 60; *Corn Products Co.* v. *Commn.*, 324 U. S. 726, 739; *United States* v. *Detroit Navigation Co.*, 326 U. S. 236, 241; *Cardillo* v. *Liberty Mutual Co.*, 330 U. S. 469, 477; *Trade Commn.* v. *Staley Co.*, 324 U. S. 746, 760.

When there is adequate support in the evidence for inferences drawn by the admnistrative agency, the court may not substitute its judgment of the inferences to be drawn from that evidence for that of the agency: *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 156; *Palmer* v. *Commissioner*, 302 U. S. 63, 70; *Commr.* v. *Scottish American Co.*, 323 U. S. 119, 125.

In the decision in *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, upon the authority of which case, *Great Lakes Steel Corp.* v. *United States*, 337 U. S. 952, was reversed and remanded, the court at page 433 states:

> "The contention of the Commission and the railroads as to Sec. 9 is this. A shipper has an alternative. He may bring his action before the Commission or before the courts. But he must make an election. If he elects to 'bring suit' in a court and is unsuccessful,

he retains the customary right of appellate review. If he elects to 'make complaint to' the Commission, as the Government did, and relief is denied, he is said to be barred by the statutory language of Sec. 9 from seeking any judicial review of the Commission order. Under the contention the order is final and not reviewable by any court even though entered arbitrarily, without substantial supporting evidence, and in defiance of law.

"Such a sweeping contention for administrative finality is out of harmony with the general legislative pattern of administrative and judicial relationships. See e.g. *Shields* v. *Utah I. C. R. Co.*, 305 U. S. 177, 181-185; *Stark* v. *Wickard*, 321 U. S. 288, 307, 310. And this Court has consistently held Commission orders reviewable upon charges that the Commission had exceeded its lawful powers. See e.g. *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91-93; *Chicago Junction case*, 264 U. S. 258, 266. The language of Sec. 9 does not suggest an abandonment of these consistent holdings."

The Court cites *Shields* v. *Utah I. C. R. Co.*, 305 U. S. 177, 181-185, as an example of the nature of judicial review which would still be available. In the *Shields* case, the Court at pages 184 and 185 states that the scope of the judicial review was limited to the question as to whether the Commission had acted within its authority, citing the leading cases on this question. Following the citations, the Court at page 185 states:

"The condition which Congress imposed was that the Commission should make its determination after hearing. There is no question that the Commission did give a hearing. Respondent appeared and the evidence which it offered was received and considered. The sole remaining question would be whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a

basis in substantial evidence or was arbitrary and capricious. Id. That question must be determined upon the evidence produced before the Commission."

It is submitted that when the lower courts found, as they did, that the findings of the Commission are supported by substantial evidence, and that there was no irregularity in the proceeding, or error in the application of the rules of law, those courts fully performed the obligations imposed upon them in connection with this proceeding.

Hereinafter we show that there was substantial evidence supporting the findings of the Commission, and that there was no error in the application of the rules of law.

There Was Substantial Evidence.

(a) Petitioner made shipments of iron and steel articles from origins in Michigan, New York and Rhode Island to Mansfield, Ohio, on which it paid the freight charges (85a).

(b) The inbound shipments of iron and steel articles received at Mansfield were fabricated into structural steel parts for building. These parts were sold to the Navy under prime or direct contracts, pursuant to which the Navy acquired title f.o.b. railroad cars at Mansfield (671c, 679c, 164a, 275a, 284a).

(c) Under this sale f.o.b. Mansfield, the Government was to pay and did pay the freight charges on the movements from Mansfield to destination (15a, 624c).

(d) The Government paid the freight charges on the shipments beyond Mansfield, some of which were based upon net land-grant [3] rates and others based on Section 22 quotations,[4] whichever basis produced the lowest charges

[3] Land grant roads under an obligation to furnish transportation to the Government at reduced rates. This was required by Title 10, U. S. C., Sec. 1375, quoted in Appendix 3. See also *So. Ry. Co.* v. *United States*, 322 U. S. 72, 73-74.

[4] Section 22 (Title 49, U. S. C., Sec. 22, carried in Appendix 1) quotations are special quotations which the carriers are permitted to make under the Interstate Commerce Act for the handling of property "for the United States."

to the Government (172a, 241a, 242a and 207a). The Government was interested only in the freight charges from Mansfield (287a).

(e) All of the shipments on which Petitioner sought to recover the alleged overcharges moved from Mansfield on government bills of lading (167a). They were consigned to an officer of the Navy (167a). Most of the shipments moved to Port Hueneme, Cal., Gulfport, Miss., or Davisville, R. I. (167a and 168a). The government bill of lading (478b, 479b, 208a, 269a) shows that the Government and the railroads are the only contracting parties and it provides that pre-payment of freight charges shall not be demanded by the carrier, nor shall collection be made from the consignee; that on presentation of the government bill of lading, properly accomplished and attached to freight voucher prepared on the authorized government form, to the office indicated on the face of the government bill of lading, payment will be made by the Government to the last carrier, unless otherwise specifically stipulated.

The government bills of lading on the outbound shipments from Mansfield, Ohio, were issued by the Navy Department to Petitioner, who assigned the bills to particular purchase orders (250a). The government bills of lading show the appropriation chargeable, the name and title of the issuing officer (250a) and bear the signature of such officer (281a). Lt. Dippold, the issuing officer (274a, 281a), testified that it was the aim and desire of the Government to make new shipments from Mansfield (279a). I. C. C. Exhibit 77 (466b, 208a, 269a) consists of photostat copies of representative government bills of lading under which these shipments moved (166a). Bill of lading N7428640 (469b, 208a, 269a) is illustrative of the government bill of lading. There is a space in the bill of lading showing in print "From (shipping point)" which has been filled in to show Mansfield, O., and a space headed "From (full name

of shipper)" which has been filled in to show "Great Lakes Steel Corporation, Stran-Steel Div." The shipment was consigned to the Supply Officer for Officer in Charge of Construction, U. S. Naval Advance Base Depot, in care of Contractors N. O. Y. 8175, at Davisville, R. I. The bill of lading shows that pick-up service was not availed of at origin by the Government or its agent, and that it covers 80 crates of beams n.o.i.b.n. iron or steel (transit) and was marked "For export." The items above referred to were filled in by Great Lakes (109a, 110a, 288a). Other items (filled in by the Navy before the billing was sent to Great Lakes) shows that the shipment was made under O. D. T. block permit QMR-NM-6600-00-N; that the freight charges were to be billed to the Navy Department, Bureau of Supplies and Accounts; that the appropriation chargeable was 1740811-40, Transportation of Things Navy 1944; that the issuing officer was the Bureau of Yards and Docks—Advance Base Division, Chicago, and that the name and title of the issuing officer was the Officer in Charge—Contracts N. O. Y. 8173 and N. O. Y. 8175. There is also a certificate of the issuing officer showing, as authority for the shipment, that it represents matters under contract or purchase order 1-C-12525, N. O. Y. 8175, dated August 22, 1944, shipped from Mansfield, O., as the f.o.b. point named in the referred-to contract or purchase order. The typewritten signature of the issuing officer is carried on the bill of lading (109a, 110a, 288a).

The Significance of the Evidence in Order to Show Its Substantiality and That There Was No Error of Law.

a. TRANSIT.

The legally applicable tariff charges for separate shipments to and from Mansfield are higher than the published through tariff rates which apply to a through shipment from Michigan, New York and Rhode Island origins to the

ultimate destinations here involved. Petitioner's position before the Commission and the courts has been that the separate inbound and outbound shipments, here involved, should be treated for rate application purposes as continuous through shipments under the fiction of transit. Petitioner further contends that such through shipments should be regarded as having been made by it. It will be seen as we progress, that Petitioner would have to prevail as to both of these contentions, whereas neither is correct.

The rate situation is illustrated by the following quotation from the Commission's decision (780c).

> "The basis of complainant's claim is illustrated by the following examples. The rate from Detroit to Mansfield is 21 cents, and the export rate from Mansfield to Port Hueneme is 63 cents. Complainant paid and bore the rate of 21 cents, and the Navy Department paid and bore the rate of 63 cents. The through export rate from Detroit to Port Hueneme with transit at Mansfield is 63 cents, plus a transit charge of 3¼ cents. Complainant claims that the applicable through rate, with transit at Mansfield, was 63 cents, plus a 3¼ cents transit charge, and seeks a refund of 21 cents which is the rate it paid on the shipment from Detroit to Mansfield. The total charges assessed on shipments from Jackson to Davisville were based on rates of 21 cents from Jackson to Mansfield plus the export rate of 29 cents from Mansfield to Davisville. The through export rate from Jackson to Davisville, with transit at Mansfield, is 33 cents, plus a transit charge of 3¼ cents. On shipments to Davisville complainant seeks refund of 17 cents which would reduce to 4 cents the charge on the inbound shipments to Mansfield."

Respondents took the position before the Commission, with which position the Commission agreed, that the shipments by Petitioner from origins in Michigan, New York and Rhode Island to Mansfield, and the shipments by the

Navy under government bills of lading from Mansfield, were separate and distinct and that the rates collected were legally applicable. The Government, as the owner of the property f.o.b. railroad cars at Mansfield, and as the one responsible for the payment of the charges therefrom, elected to make new shipments from Mansfield in order that it could receive the benefit of lower net land grant rates and Section 22 quotations, available solely to the Government. By so doing, the Government defeated the possibility of considering the separate shipments to and from Mansfield as being but parts of a continuous through movement.

A reference to the nature and theory of transit will be helpful in understanding the conclusion reached by the Commission that the charges collected were legally applicable.

As this Court said in *Central R. R. Co.* v. *United States*, 257 U. S. 247, at 257:

> "Creosoting-in-transit, like other transit privileges, rests upon the fiction that the incoming and the outgoing transportation services, which are in fact distinct, constitute a continuous shipment of the identical article from point of origin to final destination. The practice has its origin partly in local needs, partly in the competition of carriers for business. The practice is sometimes beneficial in its results; but it is open to grave abuses. To police it adequately is difficult and expensive. Unless adequately policed, it is an avenue to illegal rebates and seriously depletes the carriers' revenues."

"Transit" has been defined by the Commission in *Cottonseed, Its Products, and Related Articles*, 188 I. C. C. 605, 646, as:

> "the right of a shipper to stop at an intermediate point and change the form or substance of the com-

modity shipped, and afterwards reship the commodity so changed to point of final destination at a total charge for transportation not exceeding that which would have been applied if the changed commodity had been shipped from point of origin to final destination without being stopped in transit, sometimes with an additional charge for extra services performed at the transit point and at other times without any charge in addition to the through rate."

In *Memphis Merchants Exchange* v. *I. C. R. R. Co.*, 43 I. C. C. 378, the Commission at page 388 stated that the question whether or not shipments were subject to through rates under the fiction of transit must be determined by the essential character of the commerce, governed by the intent of the parties controlling the movement and that this intent must be ascertained from all the facts, circumstances and conditions pertaining to the traffic. At page 388, the Commission states:

"It must be apparent, however, that in the case of traffic moving under transit tariffs providing for proportional or reshipping rates and other facilities or arrangements, dependent in their applicability upon a prior or subsequent movement to or from the transit point, the intent of the parties must be measured not merely by the intent of one of the parties at the time and place of shipment, but we must look to the fully ripened and completed intent as expressed and executed by the party controlling the movement of the traffic, whether it be the original consignor or consignee or the owner, who may be neither the original consignor nor consignee."

Continuing, the Commission makes it clear that the completed intent might not exist until the one who controls the traffic finally determines what is to be done with the shipment. At page 389 the Commission further states:

"Manifestly, the shipper, consignee, or owner of a shipment cannot treat the different stages or steps of the completed movement of the traffic as a single unit for some purposes and as separable or local movements, in part, for other purposes."

In *Reduced Rates on Returned Shipments*, 19 I. C. C. 409, at page 417, the Commission stated that transit was susceptible of defense only on the theory that the inbound and outbound movements are in fact parts of a single continuous transaction, stating further:

"Once let it be conceded that the inbound and outbound movements are separate and distinct and the impropriety of applying any rates other than the regularly established locals would be self-evident."[5]

This quoted statement was again made by the Commission in *Red River Oil Co.* v. *T. & P. Ry. Co.*, 23 I. C. C. 438, at 446. See also *Lawrenceville Cooperage Co.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 773, 786.

Transit is based on the theory that the inbound and outbound movements are but parts of a single continuous transaction. *Reduced Rates on Returned Shipments*, 19 I. C. C. 409, 417; *Capital Warehouse Co.* v. *Director General*, 66 I. C. C. 683, 685. Transited shipments are through shipments from origin to destination. *Stickel & Son* v. *P. R. R.*, 151 I. C. C. 364, 366; *Brabston* v. *Louisville & N. R. Co.*, 176 I. C. C. 421, 423.

In *Lake Charles Rice Milling Co., Inc.* v. *Brimstone R. & C. Co.*, 197 I. C. C. 1, the Commission at page 13 states that shippers are not required to use transit where it is available, and cites the *Memphis Merchants Exchange* case,

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[5] In *Great Northern Ry. Co.* v. *Commodity Credit Corp.*, 77 Fed. Supp. 780, the court at page 787 states:

"Where the inbound and outbound movements are wholly independent and distinct no fiction can convert them legally into a continuous or through movement."

supra, as authority for the position that the inherent nature of the movement is governed by the intent of the parties, which is to be ascertained from all of the facts, circumstances and conditions pertaining thereto, and the intent is not to be governed merely by the intent of one of the parties, but it is to be governed by the fully ripened and completed intent as expressed and executed by the party controlling the movement, whether that may be the original consignor, consignee or owner. This matter was again considered in *Arkansas Rice Traffic Bureau* v. *Aberdeen & R. R. Co.*, 219 I. C. C. 5, where the Commission calls attention to the fact that the same contentions were made in the *Lake Charles Rice Milling Co.* case, *supra*, and at page 30 adheres to the findings made in the prior proceeding.

In *Illinois Grain to Chicago*, 40 I. C. C. 124, the carriers contended that where the shippers had recorded their inbound billing (p. 130), a definite intention was shown on the part of the shippers to make a through shipment. The Commission (p. 132), however, held that by recording the billing on inbound movements for transit, the shipper simply protected his right to avail himself either of the privilege of making a transit movement or local movement. Following such a recording of the inbound freight bill, the shipper could still elect to make a separate, independent, outbound shipment at the local outbound rate; and it was held here that the shipments in and out were separate. See also *Merchants Exchange of St. Louis* v. *B. & O. R. R.*, 34 I. C. C. 341, 353. It has been recognized that transit is optional, and that the parties may either use transit or make separate shipments in and out. See *Washburn Crosby Co.* v. *Chicago, B. & Q. Ry. Co.*, 206 I. C. C. 649, 654; and *Northern Milling Co.* v. *Chicago & N. W. Ry. Co.*, 237 I. C. C. 235, 236.

We come now to the problem necessarily faced by the Government, which purchased these goods f.o.b. Mansfield

and was responsible for and did pay the freight charges therefrom. As the unqualified owner and as the one responsible for the payment of the charges, the Government did have the unrestricted right to make such disposition of the goods as it desired. It could have localized the goods at Mansfield or it could have transported the goods beyond Mansfield in Government-owned vehicles, or arranged for transportation by means of vehicles in common or private carrier service. If any of these alternatives had been exercised by the Government, no question of rate overcharges and refund to Petitioner could possibly have arisen. Likewise, the Navy could, if it so desired, have made entirely new and independent shipments by railroad from Mansfield at charges applicable locally from Mansfield, and thus defeat the exercise of transit privileges and make impossible the fiction of continuous transportation subject to the payment of through rates.

b. The Government Made New and Independent Shipments from Mansfield.

In order that the Government could secure the advantage of the special rates which were accorded it from Mansfield, it was necessary that the transportation be "for the United States" (Title 49, U. S. C., Sec. 22).[6] By the Code of Federal Regulations, Title 4, Sec. 8.5, transportation for the United States requires a certificate of issuing officer on the government bill of lading, it being provided:

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[6] Title 49, U. S. C., Sections 6(1), 3(1), 2 and 22 require common carriers to file and keep open schedules of rates and not to make or collect from any person a greater or less compensation for any service than is charged or demanded from any other person for doing a like and contemporaneous service. The common carriers are prohibited from extending to any shipper any privilege except in accordance with the tariff. The only exception is the provision of Section 22 providing that freight may be transported "for the United States, state, or municipal governments, at free or reduced rates." See also *Illinois Central R. R.* v. *United States*, 265 U. S. 209, and *Louisville & Nashville R. R.* v. *United States*, 267 U. S. 395. Statutes here cited are carried in Appendix 1.

> "This certificate will be filled out by the government officer controlling a shipment of government property by a contractor from an f.o.b. point named in the contract to the designated point of delivery before said officer issues the bill of lading set of forms to the contractor for accomplishment by him as consignor."

The Attorney General has ruled (Vol. 40, Opinion No. 90, May 15, 1945):

> "Where a contracting officer for the Government has authorized a shipment to be made on a government bill of lading and the shipment is so made, the Government alone is liable for the freight charges. . . . In such case, the transaction clearly falls within the term 'freight transported for the United States' as used in Section 3(2) of the Interstate Commerce Act."

Lt. Dippold was the officer who signed the certificate which made the government bill of lading an authorized document and evidenced the fact that the transportation was being performed for the payment of freight charges by the Government (284a). He testified that it was the aim and desire of the Government to make separate, distinct, and new shipments from Mansfield, independent of any transportation matters that may be connected with the inbound movement (279a, 284a, 285a). He issued the government bills of lading here involved (274a). He stated that the Government was interested only in the transportation service from Mansfield (284a, 285a) and in the freight charges from Mansfield (287a). The Navy furnished blanket routes for the shipments (252a, 274a) bearing in mind in those instructions the matter of possible land-grant deductions which the Government might have available (280a).

The best test of the Government's intent is what it actually did. *Radio Officers* v. *Labor Board*, 347 U. S. 17, 45.

The Government's intent to make new and independent shipments from Mansfield is established by the fact that it secured title f.o.b. cars at Mansfield; that it arranged for the movement from Mansfield on government bills of lading, and that the charges on the shipments from Mansfield were settled by the Government on the basis of Government net land grant rates or as modified by Section 22 quotations (207a). Net land grant rates were paid by the Government on the movements from Mansfield to Gulfport, Miss. (241a, 242a).

The export rate of 63 cents from Mansfield to Port Hueneme (212a, 213a) was applicable under the tariffs only upon compliance with the regulations carried in Exhibit 80 (480b, 208a, 269a and 194a). None of the shipments to the West Coast complied with these rules (171a). Under Section 22 quotations 265 and 265-A carried in Exhibits 81 and 82 (482b, 483b, 484b, 485b, 486b, 208a, 269a) these rules were waived on shipments made by the Government and on which it paid the freight charges (171a). Petitioner at page 13 of its petition, incorrectly states that if these shipments to the West Coast had been commercial shipments the transit tariffs would have been applicable, referring to page 214a of the record. Witness Brenner stated (214a) that if these were commercial export shipments made by Great Lakes Steel Corporation out of Mansfield the 63 cent rate would apply *if all of the requirements of the export tariff were met.*

At record page 194a, Mr. Brenner made it clear that in order to obtain the export rate of 63 cents, any one other than the Government would have to comply with all of the requirements of the tariff in which the export rate was published and he showed those requirements in his Exhibit 80.

The case of *Peden Iron & Steel Co.* v. *Texas & N. O. R. Co.*, 264 I. C. C. 769, 268 I. C. C. 562, is determinative that

failure to comply with regulations such as carried in Exhibit 80 (480b, 208a, 269a) makes inapplicable the export rates conditioned thereon. See also *Mack Mfg. Corp.* v. *Alton & S. R. Co.*, 263 I. C. C. 331; *International-Stacy Corp.* v. *Chesapeake & O. Ry. Co.*, 262 I. C. C. 349.

In the first report in the *Peden* case, 264 I. C. C. 759, it is stated at page 771 that since the shipments did not comply with such regulations "the export rates therefore did not apply to them." In the second report in this case, 268 I. C. C. 562, it is stated at page 563 "the requirements of the export tariff were not met and the domestic rates to Alameda and Oakland of $1.05 from St. Louis and $1.10 from the other origins named, therefore were applicable." It is further shown in the second report that the export rate there involved, 44 cents, would have applied on the shipments in issue if those shipments had complied with the regulations similar to those carried in Exhibit 80 (480b, 208a, 269a). Due solely to the fact that such regulations were not complied with, the domestic rate became applicable. The issue in that case was the reasonableness of the domestic rate, in view of the circumstances and conditions applying to the traffic. It was under this issue that the Commission then considered what should be fixed as a reasonable rate, and decided not upon 44 cents, the export rate if there had been compliance, but upon 74 cents. It is thus clear from the *Peden* case that failure to comply with regulations such as carried in Exhibit 80 makes inapplicable a rate depending upon such provisions. The further fact that upon non-compliance with those provisions, the Commission fixed a rate substantially higher than the export rate applicable where the conditions were complied with, demonstrates that the Government did secure a distinct advantage through the Section 22 quotations which enabled it to use the export rate of 63 cents in spite of non-compliance with the provisions carried in Exhibit 80.

At the time the movements here involved were made, the domestic rate from Mansfield to the West Coast was $1.27 (I. C. C. Exhibit 84, 516b, 196a). The net land-grant rate to the Government, if the Government used this rate, would have been 79.896 cents (196a). The rate accorded the Government from Mansfield to the West Coast under the Section 22 quotations was 63 cents. If this 63 cent rate could be considered a tariff rate, or a rate which was available to or which could in any way be used by Petitioner, the charge which the railroads could have collected from the Government from Mansfield to the West Coast would have been only 39.971 cents per cwt. (194a).

It can be seen from an examination of Title 10, U. S. C., Sec. 1375 (Appendix 3), that if the 63 cent rate were a tariff rate or a rate available for like transportation performed by the public at large, the Government then would have been entitled to a net land grant rate, which would have been 39.971 cents per cwt. (194a).

Conversely, since land-grant rates and the special Section 22 quotations were accorded to the Government for the movement beyond Mansfield, a commercial shipper, such as Petitioner, could not use any such special charges. It is unlawful to permit special rates accorded to the Government to accrue to any party other than the Government itself. *Givens* v. *L. & N. R. R. Co.*, 140 I. C. C. 605, 606; *Henry H. Cross Co.* v. *United States*, 133 Fed. (2d) 183, 186-187.

Admittedly the shipments from the origin points in Michigan, New York, and Rhode Island, to Mansfield were commercial shipments. The Government did not become concerned with the movement until it secured title f.o.b. cars at Mansfield. In order for the Government to become entitled to any of the rights and privileges, which only it could secure, it was necessary that the movement beyond Mansfield enjoying such rights and privileges be a move-

ment, as shown above, "for the United States." Were we to attempt to consider the commercial shipment to Mansfield and the governmental shipment from Mansfield as parts of a through shipment—a single unit—it is apparent that we would have neither an entirely commercial unit nor an entirely governmental unit. It is shown of record (220a, 221a, 223a) that a through commercial shipment from Detroit or Jackson, Michigan, via Mansfield to Port Hueneme, California, would have been subject to a tariff rate of $1.48. Due solely to the fact that the shipments from Mansfield were shipments "for the United States," the Government under Section 22 quotations became entitled to a rate of 63 cents. Due solely to the fact that the shipments from Mansfield to Gulfport were "for the United States," the Government became entitled to the use of net land-grant rates, and if the origin of Government shipments to Gulfport had been either Detroit or Jackson, Michigan, or Jamestown, New York, the net land-grant rates to the Government would have been higher than it paid from Mansfield (196a).

Throughout the proceedings before the Commission, Petitioner urged, as it does here, that it was the shipper of the goods from Mansfield. It may be shown by the bill of lading or otherwise that the shipper named therein was not acting on his own behalf. See *L. & N. R. R. Co.* v. *Central Iron Co.*, 265 U. S. 59, at 67, and *Agricultural Lands, Inc.* v. *Pan Handle & S. F. Ry. Co.*, 60 Fed. Supp. 108 at 109-110. A shipper has been defined as one who exercises direct control of the shipment, *United States* v. *Metropolitan Lumber Co.*, 254 Fed. 335, 346, and as the "owner or person for whose account the carriage of goods is undertaken." *Compagnie Generale Transatlantique* v. *American Tobacco Co.*, 31 Fed. (2d) 663, 667. Petitioner has admitted that the movement beyond Mansfield was of material that was being carried for the Government (681c).

In *Louisville & Nashville R. R.* v. *United States,* 267 U. S. 395, the court considers a case where coal had been purchased by the Government at origin under a contract providing that it would furnish the bills of lading and pay the freight charges. The court states at page 399:

> ". . . the contract required shipment in carload lots on forms of bills of lading furnished by the contracting officer, and bound the United States to pay freight charges from the mine to Mobile. This meant that the contractor was not to be concerned with or responsible for transportation by rail."

The facts show that the Government was—and necessarily—the shipper from Mansfield, but in addition we call attention to the fact that the rule set out in *Memphis Merchants Exchange* v. *I. C. R. R. Co.,* 43 I. C. C. 378, 388, and in *Lake Charles Rice Milling Co.* v. *Brimstone R. & C. Co.,* 197 I. C. C. 1 at 13, makes it clear that the question of whether through shipments were effectuated or separate shipments made depends upon the intent of the parties measured by the fully ripened and completed intent, as expressed and executed by the party *controlling the movement of the traffic,* whether that be the original consignor, or consignee, or owner. We believe it patent that the Government as owner f.o.b. did *control the movement from Mansfield.*

There Is No Merit in Petitioner's Contentions.

Petitioner contends that in determining the question as to whether the movements to and from Mansfield were separate and independent shipments or constituted one continuous movement under the provisions of the governing transit tariffs, the Commission predicated its decision on findings that the property was that of the Government loaded on cars at Mansfield; that the Government was

interested only in the transportation service from Mansfield; that it was the purpose of the Navy Department to make new shipments from Mansfield independent of the inbound movements; that the continuity of the shipments terminated at the transit point when the Navy elected to ship them from that point as separate and independent shipments; that control of the shipments from the transit point passed to the Navy Department, who paid or would pay charges "on the basis of the rates, as modified by Section 22 quotations, or subject to land-grant deductions, from the transit point to final destinations," and that having lost control of the goods, petitioner could not restore the continuity of the shipments.

Petitioner contends that there was no substantial evidence supporting the above findings. We answer these contentions in the foregoing sections of our argument, where we relate and explain the evidence.

Petitioner then contends that the Commission did not consider the terms of the transit tariffs, nor find any failure on the part of Petitioner to comply with all the provisions of the transit tariffs, stating that the effect of this decision would be to prevent application of transit tariffs to all shipments made on government bills of lading, and such holding would have a serious effect on government contractors and on the Government itself, since it would increase the costs of every government contractor, hence, increase the price to the Government.

Petitioner also contends that transfer of title has no effect upon the continuous character of the shipment, and that the tariffs did not require the payment of the outbound freight charges by the transit house operator.

There is no holding by the Commission that transfer of title itself has any bearing on the continuous character of a shipment, nor is there any holding that the transit house operator himself had to pay the outbound freight charges.

The Commission did not find that there could be no transit because there was a new owner. The Commission found, as a fact, that it was the purpose of the Navy as the new owner, to make new shipments from Mansfield independent of the inbound movements, and that control of the shipments from the transit point passed from the Petitioner to that new owner, who paid or will pay the freight charges on the basis of rates as modified by Section 22 quotations, or subject to land-grant deductions from the transit point to destination.

Petitioner at page 14 states that it has been uniformly held, that the question of continuity is to be decided on the facts with respect to the movement, and not on any *claimed* intention of one of the persons involved, citing *United States* v. *Erie Railroad Company,* 280 U. S. 98; *Baltimore & Ohio S. W. R. R. Co.* v. *Settle,* 260 U. S. 166; *Southern Pacific Terminal Co.* v. *I. C. C.,* 219 U. S. 498; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Iowa,* 233 U. S. 334. It is true that the question of continuity of transportation is to be determined by the facts in each case, and by proven intent rather than by any "claimed" intention. The four cited cases are cases determining whether the movement was interstate or intrastate. It was shown in the first three that it was the *continuing* intention of the people connected with the shipments from the time the goods left origin, that they were going to final destination, hence, interstate rates applied. In the last of the cases cited, *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Iowa,* 233 U. S. 334, it was held that the further shipment was an intrastate shipment because continuity had been broken. The court at page 343 states:

> "But the fact that commodities received on interstate shipments are reshipped by the consignees, in the cars in which they are received, to other points of destination, does not necessarily establish a continuity of

movement or prevent the reshipment to a point within the same State from having an independent and intrastate character."

The question whether the shipments to and from Mansfield were separate and distinct shipments, or constituted one continuous through movement under the tariffs governing transit, was a question of fact for the decision of the Commission in this proceeding. In *United States* v. *Wabash R. Co.*, 321 U. S. 403, at page 408, it is stated:

> "In sustaining the Commission's findings in these proceedings, as in related cases, this Court has held that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, and that its findings on that question will not be disturbed by the courts if supported by evidence. *United States* v. *American Sheet & Tin Plate Co., supra,* 408; *United States* v. *Pan American Petroleum Corp., supra,* 158; *Interstate Commerce Commission* v. *Hoboken Mfrs. R. Co.*, 320 U. S. 368, 378, and cases cited."

An examination of the Commission's decision shows that there is no holding which prevents the application of the transit tariffs to all shipments made on government bills of lading. In purchasing property, the Government may take title at the plant of the supplier and pay freight charges therefrom at levels which were available to the Government at the time these shipments moved. The Government also may purchase the property f.o.b. destination. It is not the use of government bills of lading which controls the question as to who is making the shipment, or what kind of shipment is being made, *Louisville & Nashville R. R. Co.* v. *United States,* 267 U. S. 395, at 398. This *L. & N.* case, and the case of *Illinois Central R. R.* v. *United States,* 265 U. S. 209, show that the question whether ship-

ments while in transit were the property of the United States and properly transported at land-grant rates, or did not become the property of the United States until after receipt at destination, hence, subject to commercial rates, rests upon the nature of the contract between the Government and its supplier.

Where bids are asked for prices f.o.b. cars at place of shipment, with the United States paying the freight and furnishing shipping instructions and bills of lading, the court held that it was shown that the Government intended to avail itself of the fact that the shipments were to be transported over land-grant roads, and that it was entitled to deductions from the commercial rates (265 U. S. 209, 213). In *Louisville & Nashville R. R. Co.* v. *United States*, 267 U. S. 395, some of the coal was purchased f.o.b. origin, and other of the coal was purchased f.o.b. destination. As to that coal furnished f.o.b. mine, the court said (p. 399) that if mine delivery should be selected—

> "the coal would be ordered in carload lots and shipped on government bills of lading. In harmony with that provision, the contract required shipment in carload lots on forms of bills of lading furnished by the contracting officer, and bound the United States to pay freight charges from the mine to Mobile. This meant that the contractor was not to be concerned with or responsible for the transportation by rail."

It is seen by these cases that the Government had a choice of terms. In the instant case, the Government secured title to these goods f.o.b. Mansfield, and it was only required to pay the freight charges from Mansfield (15a). The Government's contract did not assure to Petitioner that the shipments beyond Mansfield would be so handled that Petitioner could secure refund of the charges paid on their shipments into Mansfield. Petitioner was, under its contract with the

Government, to pay and bear the freight charges up to Mansfield (680c).

It was not necessary for the Commission to make any finding concerning the terms of the transit tariffs, since it found that the shipments were separate and distinct. However, the record shows that the rules of the transit tariff (contrary to the contention of Petitioner) were not complied with. These tariffs require payment of the *lawful* rate to the transit point and, when handled under the claim method, provide that the outbound shipment will be charged the *lawful* rate and on settlement of the claim and adjustment made on the basis of the "*lawful* through rate." See Rule 12, I. C. C. Exhibit 64 (410b, 151a, 269a) and Rule K-35, I. C. C. Exhibit 68 (445b, 151a, 269a). Petitioner contended that "lawful" rates per these tariffs should be considered to include the special charges accorded the Government under Section 22 quotations or under the land-grant provisions (265a). The Elkins Act provides that the tariff rate shall be conclusively deemed to be the *lawful* rate (49 U. S. C., Sec. 41, paragraphs 1 and 2).[7] *Armour Packing Co.* v. *United States*, 209 U. S. 56 at page 69, outlines the developments leading up to the enactment of the Elkins Act and shows the purpose Congress had in mind in providing that the tariff rate shall be conclusively deemed to be the *lawful* rate. See also *Louis. & Nash. R. R.* v. *Maxwell*, 237 U. S. 94, 97; *Pittsburgh &c. Ry. Co.* v. *Fink*, 250 U. S. 577, 581. The Commission has also made it clear that the tariffs established in a lawful manner state the rates that are "legally applicable under Section 6 of the Act." *Bacon Bros.* v. *Alabama G. S. R. Co.*, 263 I. C. C. 587, 590.

The case of *Thompson* v. *Baltimore & O. R. Co.*, 59 F. Supp. 21, considers both the net land grant rates and

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[7] Statute carried as Appendix 2.

Section 22 quotations to the Government. The Court at page 35 states:

> "Land grant rates are not filed 'with the Commission' and no requirement of the Act above referred to has ever been applied, nor do we understand the parties hereto are contending it should be applied to land grant rates. Section 6(3) of the Act provides:
>
> > " '*No change shall be made in the rates,* fares and charges *or joint rates,* fares and charges which *have been filed and published by any common carrier in compliance with the requirements of this Section, except after thirty days' notice to the Commission and to the public published as aforesaid,* which . . . and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. . . .'
>
> "Neither the carriers nor the Commission have ever held that this section applies to land grant rates."

At page 37, the court quotes from Conference Ruling No. 208(e) with the emphasis we show here:

> "(e) Section 22 of the act authorizes carriers to grant free or reduced-rate transportation of property for the United States, state, or municipal governments, or for charitable purposes or for exhibitions at fairs or expositions. It also authorizes free or reduced-fare transportation of certain specified persons. This *special provision and the words 'reduced rates' are construed to be special authority for carriers to depart from established tariff or fares;* and for such transportation as is provided for in said section 22 it is not necessary for carriers to *provide tariffs or observe tariff rates or fares and regulations, etc.*"

Transit tariffs must be strictly complied with in order to obtain the transit basis. *Transit on Vegetable Oils in*

Southern Territory, 197 I. C. C. 705, 712; *Absorption of Drayage & Trucking Charges,* 197 I. C. C. 675, 687.

Petitioner paid the freight charges on the shipments to Mansfield and the Government paid the freight charges on the shipments from Mansfield. It is well settled by many decisions of the Commission that reparation will not be awarded where claimant has paid only a portion of the total freight charges involved. *Atlas Lbr. Co.* v. *Baltimore & O. R. R. Co.,* 256 I. C. C. 67, 70; *Hauser Packing Co.* v. *Atchison, T. & S. F. Ry. Co.,* 220 I. C. C. 356, 360; *Schreiber Milling & Grain Co.* v. *Chicago G. W. R. R. Co.,* 213 I. C. C. 731, 733-734; *Liberty Hide & Fur Co.* v. *Atchison, T. & S. F. Ry. Co.,* 188 I. C. C. 763, 766. Petitioner at page 16 states that this Court has held that the right to recover excess charges is not dependent upon who bears the freight charges, but on the contract of carriage. Petitioner is mistaken as to the holding in these cases. *Adams* v. *Mills,* 286 U. S. 397, and *Southern Pacific Co.* v. *Darnell-Taenzer Lbr. Co.,* 245 U. S. 531, hold that the party who paid the improper charges is the one entitled to recover any reparation. In these first two cases that was the consignee. In *Louisville & Nashville Railroad Co.* v. *Sloss-Sheffield Steel & Iron Co.,* 269 U. S. 217, the shipper was shown to have sold the goods f.o.b. destination, and was shown to have borne the entire charges, hence, was enabled to recover the excess.

Other questions were thoroughly dealt with in the progress of this case before the Commission. For example, the effect of *Cudahy Packing Co.* v. *Baltimore & O. R. R. Co.,* 263 I. C. C. 503, cited by the Commission in its decision, was discussed in Petitioner's petition for reconsideration (733c) and in respondents' reply (758c); the effect of Petitioner ordering and loading the cars and paying any demurrage which might accrue in view of the sale to the Government f.o.b. Mansfield was discussed in Petitioner's

exceptions to the proposed report (625c) and in respondents' reply (656c et seq.); the matter of Petitioner putting "transit" on the bills of lading is considered in their exceptions to the proposed report (627c) and in the petition for reconsideration (736c), and answered in respondents' reply to the exceptions (660c) and more fully in respondents' reply to the petition for reconsideration (beginning at 767c), where it is pointed out that the circumstances do not show a situation of estoppel, and that the assessment of freight charges could not be affected by consideration of estoppel.

Certiorari Should Be Denied.

In *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, the Court at page 502 states:

> ". . . Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' *Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387, 393."

In *Forsyth* v. *Hammond*, 166 U. S. 506, the Court at the bottom of page 513 states:

> "So it has been that this court, while not doubting its power, has been chary of action in respect to certioraries. It has said: 'It is evident that it is solely questions of gravity and importance that the Circuit Courts of Appeal should certify to us for instruction; and that it is only when such questions are involved that the power of this court to require a case in which the judgment and decree of the Court of Appeals is made final, to be certified, can be properly invoked.' *Lau Ow Bew, Petitioner*, 141 U. S. 583, 587; *In re Woods*, 143 U. S. 202; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58; *American Construction Company* v. *Jacksonville Railway Company*, 148 U. S. 372, 383."

In *Magnum Co.* v. *Coty*, 262 U. S. 159, the Court at page 163 states:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty per cent. of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

In the first decision of the District Court in the instant case, 81 Fed. 450, the decision turned on the jurisdictional question. Upon appeal this Court in 337 U. S. 952 reversed the District Court upon the authority of *United States* v. *Interstate Commerce Commission*, 337 U. S. 426.

In the latter case the Court after passing on the Election of Remedies feature held that judicial review of an order denying reparation did not require a three-judge court, because the purpose of creating the Commerce Court with such direct appeals was expedition of final determination of the validity of certain types of Commission orders. This expedition was sought for orders of national or widespread interest, such, for example, as railroad rate orders.

At page 441 the Court states:

> "The Commerce Act itself indicated that the same expedition necessary in cases affecting the public generally was not necessary in other kinds of cases involving 'local and isolated questions which arise in the ordinary courts.' "

At page 442, it is stated:

> ". . . And in a case not involving reparations this Court held that orders relating merely to the payment

of money are not likely to be of sufficient public importance to justify use of the three-judge procedure. See *United States* v. *Griffin*, 303 U. S. 226, 233, 234-237. But cf. *El Dorado Oil Works* v. *United States*, 328 U. S. 12, 18-19; *United States* v. *Jones*, 336 U. S. 641, 647. The Urgent Deficiencies Act with 49 U. S. C. Section 9, which requires enforcement of Commission reparation awards in one-judge courts, indicates the belief of Congress that such orders are not of sufficient public importance to justify the accelerated judicial review procedure."

At page 443, the Court states:

"While the Government here does not seek enforcement of a Commission order for the payment of money, the root of the controversy concerns the payment of money damages under 49 U. S. C. Sections 8, 9. . . ."

". . . For actions to enforce Commission orders awarding reparation and actions to challenge Commission orders denying reparations, basically involve the same parties, the same disputes, the same claims for money damages, and the same statutes. We think the orders in both instances should be reviewed in the same one-judge tribunal.

". . . We are confident that in holding that one judge rather than three should entertain cases challenging Commission reparation orders we interpret the congressional expediting procedure and the Interstate Commerce Act in accordance with their basic purpose."

It is submitted that, in view of the holding in the above case and the reasons therefor, the instant case is not that nature of case warranting the granting of a writ of certiorari.

The Court has stated that the granting of the writ (certiorari) would not be warranted merely to review the evidence or inferences drawn from it. *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, at page 178; *Southern Power Co.* v. *N. C. Public Service Co.*, 263 U. S. 508, 509;

United States v. *Johnston*, 268 U. S. 220, 227; *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502.

In *Radio Corp.* v. *United States*, 341 U. S. 412, at page 415, the Court states—

> ". . . in considering the question of sufficiency of evidence to support an administrative order, this court must and does rely largely on a first reviewing court's conclusion. *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474."

In *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, the Court at page 491 states:

> "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

It is submitted that the standard for judicial review was not misapprehended or grossly misapplied in our instant case.

The Court has also said that it must be a strong case in which this Court will set aside concurrent findings of two lower courts. *Goodyear Co.* v. *Ray-O-Vac Co.*, 321 U. S. 275, 278; *Anderson* v. *Abbott*, 321 U. S. 349, 356; *Texas & N. O. Ry. Co.* v. *Ry. Clerks*, 281 U. S. 548, 558; *Virginian Ry.* v. *Federation*, 300 U. S. 515, 542.

The present proceeding has been the subject of a proposed report by two of the Commission's examiners (606c). Petitioner filed exceptions (615c). Respondents replied (651c). There was an oral argument before Division 2 of the Commission (668c). There was a decision by Division 2 of the Commission (778c, 264 I. C. C. 779). Petition for reconsideration was filed (726c) and denied by the Commission (775c). There was a very full consideration of this

proceeding by the District Court prior to rendering its decision reported in 115 Fed. Supp. 31 (806c-807c). The matter was argued before the Court of Appeals for the Sixth Circuit, which court entered its order on February 12, 1955. All of these decisions in the progress of this case have been uniformly and unanimously against the contentions of Petitioner. The same contentions are made here as have been made before the Commission and the lower courts.

CONCLUSION

We believe that we have made clear the fact that there has been accorded to this case full and proper court review; that the findings of the Commission are supported by substantial evidence, and that there was no irregularity in the proceedings, or error in the application of the rules of law.

We submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX 1

Title 49, U. S. C., Section 2 reads:

"If any common carrier subject to the provisions of this chapter shall directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

Title 49, U. S. C., Section 3(1) reads:

"It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Title 49, U. S. C., Section 6(1), so far as here pertinent reads:

"(1) Schedule of rates, fares, and charges; filing and posting. Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee."

Title 49, U. S. C. Sec. 9 reads:

"Remedies of persons damaged; election; witnesses: Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue

both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

Title 49, U. S. C. Section 22, so far as here pertinent reads:

"Nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the transportation of persons for the United States Government free or at reduced rates. . . ."

APPENDIX 2

Title 49, U. S. C. Section 41, paragraphs 1 and 2 read as follows:

"(1) Anything done or omitted to be done by a corporation common carrier, subject to chapter 1 of this title, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under sections 41, 42, or 43 of this

title, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in chapter 1 of this title or by sections 41, 42, or 43 of this title, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to chapter 1 of this title to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: *Provided,* That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title, or of chapter 1 of this title, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any

court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

"(2) In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of chapter 1 of this title, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under sections 41, 42 or 43 of this title, shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section."

APPENDIX 3

Title 10, U. S. C., Section 1375 reads as follows:

"Charges for transportation by land-grant railroads subject to regulation by Congress. Payment shall be made at such rates as the Secretary of War shall deem just and reasonable and shall not exceed 50 per centum of the full amount of compensation, computed on the basis of the tariff or lower special rates for like transportation performed for the public at large, for the transportation of property or troops of the United States over any railroad which under land-grant acts was aided in its construction by a grant of land on condition that said railroad shall be and remain a

public highway for the use of the United States, and for which adjustment of compensation is required in accordance with decisions of the Supreme Court construing such land-grant acts, or over any railroad which was aided in its construction by a grant of land on condition that such railroad should be a post route and military road, subject to such regulations as Congress may impose restricting the charge for such Government transportation, and such payment shall be accepted as in full for all demands for such service."

No. 68

In the Supreme Court of the United States

OCTOBER TERM, 1954

GREAT LAKES STEEL CORPORATION, A DELAWARE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, ERIE RAILROAD COMPANY, AND THE PENNSYLVANIA RAILROAD COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT INTERSTATE COMMERCE COMMISSION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 787

GREAT LAKES STEEL CORPORATION, A DELAWARE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, ERIE RAILROAD COMPANY, AND THE PENNSYLVANIA RAILROAD COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT INTERSTATE COMMERCE COMMISSION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of Division 2 of the Interstate Commerce Commission (R. 778c) is reported at 264 I.C.C. 779. The opinion of the statutory three-judge court for the Eastern District of Michigan, Southern Division, dismissing the complaint for lack of jurisdiction (R. 791c), is reported at 81 F. Supp. 450. The judgment of the three-judge court reversed by this court and re-

manded for hearing on the merits by a single judge (R. 804c), is reported at 337 U.S. 952. The judgment of the District Court dismissing the case on the merits (R. 806c) is reported at 115 F. Supp. 31. The Court of Appeals affirmed the judgment of the District Court, 220 F. 2d 751. The order of affirmance is attached to the petition herein as Appendix 3, pp. 26-27.

JURISDICTION

The order of the Court of Appeals, affirming the District Court, was entered on February 12, 1955, and the order denying the petition for rehearing was entered on March 18, 1955. (These orders are attached to the petition herein as Appendix 3, pp. 26-27.) The petition for a writ of certiorari was filed May 13, 1955. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred in refusing to set aside the order of the Commission and in affirming the judgment of the District Court. This question involves the consideration of the following questions:

1. Did the Commission err as a matter of law in its construction of the tariffs?

2. Is the Commission's order supported by substantial evidence?

STATUTES INVOLVED

The pertinent provision of the statutes involved are set forth in the appendix to the petition.

STATEMENT OF THE CASE

By complaint filed with the Commission, on September 4, 1944, the petitioner alleged in substance that the refusal of the railroads to apply their fabrication-in-transit tariffs at Mansfield, Ohio, on shipments of steel consigned by petitioner, to that point, violated Section 6(7) of the Interstate Commerce Act (49 U.S.C. 6(7)), thus requiring the payment of reparation to petitioner (R. 13a).[1]

After hearing before a Commission examiner, at which evidence was taken (R. 45a-292a), a proposed report was issued in which the examiner found that the rates charged were applicable, and recommended dismissal of the complaint (R. 606c). Following exceptions made to the proposed report (R. 615c) and oral argument before Division 2 (R. 668c), the report and order of that division

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[1] It was alleged in the complaint that petitioner was engaged in the business of fabricating iron and steel articles at Mansfield, requiring the use of carload shipments of these metals which were shipped by it from points in Michigan, New York and Rhode Island to Mansfield and on which it paid the freight charges. It also was alleged that after such fabrication the articles were shipped from Mansfield on Government bills of lading to various Naval Bases in the United States and that the Government paid the freight charges from Mansfield. It claimed that the separate charges made by the carriers, based upon a combination of the local rates to and from Mansfield (which was more than the through rate), were unlawful under Section 6(7) of the Act to the extent that they exceeded the through rate from origin to final destination. Petitioner claimed that the through rate was applicable on such shipments under the governing transit tariff then in effect, and it asked an award of reparation for the overcharges (R. 13a).

were issued which found that the rates assailed were not shown to have been inapplicable (R. 778c). The petition for reconsideration, rehearing and reargument (R. 730c) was denied by the entire Commission (R. 775c).

Thereafter, on January 13, 1947, petitioner filed suit in the three-judge District Court to set aside the Commission's order (R. 5a). The court dismissed the suit for lack of jurisdiction (R. 791c). The case was appealed directly to this Court and was reversed and remanded for hearing before the District Court, as regularly constituted, consisting of a single judge. This was on authority of the Court's decision in *United States* v. *Interstate Commerce Commission,* 337 U.S. 426 (R. 804c). Following argument and reargument before the District Court, which found that the Commission's order was supported by substantial evidence and that there was no irregularity in the proceedings before the Commission or error in the application of the rules of law (R. 806c), the case was appealed to Court of Appeals, Sixth Circuit. The Court of Appeals affirmed the judgment of the District Court and petitioner has asked that a writ of certiorari issue to review that judgment.

The Facts

Since the issues of this case are deeply rooted in the facts, it is considered necessary to set forth at some length the background of the controversy.

The petitioner, a manufacturer of iron and steel articles with plants at Detroit and Jackson, Mich-

igan (R. 58a), obtained a plant at Mansfield, Ohio in 1942 for the purpose of fabricating steel products into Quonset huts for the Navy (R. 59a-60a). During the course of its consideration of the desirability of locating a plant at Mansfield, petitioner entered into a series of correspondence and conferences with the railroads pertaining to the rates and transit arrangements which would be applicable to the shipments of steel into Mansfield and shipments of the finished Quonset huts from that place to the ultimate destinations (R. 294b-328b).[2]

When it developed that the Navy was to take possession and ownership of the Quonset huts f.o.b. Mansfield, that it was to use Government bills of lading, and that it would take advantage of the freight rate structure available to the Government[3] and otherwise make the outbound movements local shipments, the carriers advised the petitioner that

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[2] Apparently without the parties having discussed or being aware of the manner in which the Navy would direct delivery of the huts at Mansfield (as nothing was said on this point during the earlier negotiations) the railroads either published tariffs or amended existing tariffs purporting, under certain conditions, to permit petitioner to ship steel into Mansfield, there fabricate it into Quonset huts and to ship the huts to ultimate destinations at the through rate from the first point of origin to the ultimate destination, plus 3¼ cents per 100 pounds for the transit service (R. 71a; 328b).

[3] See Section 22 of the Interstate Commerce Act which provides that railroads may transport freight for the Government at free or reduced rates, and the land grant deduction provisions of Section 1375, Title 10 U.S.C. See *Southern Ry. Co.* v. *United States*, 322 U.S. 72.

it could not avail itself of the transit arrangements (R. 329b-331b, 336b, 246a). Despite this information, given before any of the involved shipments moved, petitioner decided it would go forward with its fabrication project on the assumption that its claims to transit would be recognized (R. 531b. 246a, 247a).[4]

The Commission found in its report (264 I.C.C. 779, 780, R. 780c) that the tariffs provided two methods by which the benefit of transit might be obtained.

As to both, the tariff provides that the inbound shipments will be assessed the *lawful* rate applicable from origin to the transit point (Mansfield). On the outbound shipment from the transit point, the payment may be made on the basis of (1) the difference between the through rate, from the first origin to final destination and the rate paid from origin to the transit point, or (2) the payment of the rate applicable from the transit point to final destination and the filing of a claim with the carrier for the difference between the applicable through rate (plus transit charge) and the sum of the locals to and from the transit point (R. 410b, 445b). Petitioner admitted that the lawful rate meant the rate specified in the tariff (R. 144a, 145a).

The Commission decided that when petitioner shipped steel to its plant at Mansfield (from various points of production), fabricated articles at

[4] When the railroads refused to honor claims for overcharges (R. 364b), petitioner filed its complaint in the Commission proceedings.

that point which it sold f.o.b. Mansfield to the Government, and which the Government thereafter shipped to various Naval bases, that petitioner was not entitled to claim that the movements to and from Mansfield were single through shipments made by petitioner. Thus the Commission held that the transit tariffs were not applicable so as to require the carriers to settle with petitioner on the basis of the lower through rate, plus the transit charge.[5]

The evidence shows that the movements from Mansfield were on bills of lading, issued on behalf of the Government by the Navy; that the Navy gave routing instructions (R. 161a, 252a); that the bills of lading were given to petitioner by the Navy in blank form and bore the name and title of the issuing naval officer, and showed the appropriation out of which the payment of the rates assessed to the Navy were to be charged (R. 250a, 109a-110a).

The Commission found that "The contents of the shipments from Mansfield were the property of the Government as soon as they were loaded on

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[5] This was so because the Commission found (R. 779c-781c), that the Navy took title to the shipments f.o.b. railroad car at Mansfield (R. 164a, 275a, 284a, 289a); that all shipments moved on Government bills of lading (R. 167a); that the Government and the railroads were the only parties to the contract of carriage from Mansfield; that the bills of lading show that the Government was to pay and did pay charges for such transportation (R. 478b, 479b, 168a); and that the payments were made by the Government from Mansfield on the basis of Section 22 quotations or land grant rates, whichever was more favorable to the Government (R. 168a, 207a). See footnote 3, *supra*.

the cars at that point, and that the Government was interested only in the transportation service from Mansfield." Also that "It was the purpose of the Navy Department to make new shipments from Mansfield" (R. 781c). The Commission then made the ultimate finding that the transit tariffs were inapplicable under the facts found and directed dismissal of the complaint (R. 782c).

Upon review the District Court concluded that the "Findings of the Commission are supported by substantial evidence, and there was no irregularity in the proceeding or error in the application of the rules of law." (R. 806c) The Court of Appeals affirmed the judgment of the District Court. (Appendix 3 to Petition for Writ of Certiorari herein.)

ARGUMENT

The controversy concerns a single shipper and arose with respect to a tariff and rates from a single locality and insofar as the record reveals does not affect the rights of any other shipper. The decisions of the Court of Appeals, the District Court and of the Commission are not in conflict with any applicable decision of this Court, or any other court. Petitioner fails to demonstrate that the decision of the Court of Appeals raises any questions of general importance.

The Nature and Theory of Transit

Petitioner's theory of the case is that the separate inbound and outbound shipments at Mansfield should be treated, for rate purposes, as continuous

through shipments (under the fiction of transit) and that such through shipments should be regarded as having been made by petitioner.

The theory of transit has been considered by the Commission and by the courts many times and the term has come to have a well-defined meaning and the practice has a well-defined purpose. *Cottonseed, Its Products and Related Articles,* 188 I.C.C. 605, 646.

From the earliest days of its existence as a regulatory body the Commission has held, as to whether or not shipments are subject to through rates under the theory or fiction of transit, that this question must be determined by the intent of the parties controlling the movement, and if the inbound and outbound shipments are separate and distinct movements transit rates would not apply and such shipments would take the regularly established local rates. It has uniformly so held. Intent and control over the shipments, therefore, are the most important factors employed by the Commission in determining whether shipments are entitled to the transit rate. The Commission has said that intent of the parties "must be measured not merely by the intent of one of the parties" but by the "fully ripened and completed intent as expressed and executed by the party controlling the movement of the traffic". *Memphis Merchants Exchange* v. *Illinois Cent. R. R. Co.*, 43 I.C.C. 378, 388.

The courts have likewise taken into consideration the matter of intent and control in determin-

ing the character of the transportation for purposes of deciding whether there has been an interruption of the continuity of the service. The case of *Baltimore & O. R.R. Co.* v. *United States,* 24 F. Supp. 734, opinion by Circuit Judge Learned Hand (pages 736-737), held that whether there has been a continuity of carriage is determined by "the intent of the parties at the outset to unite all parts of the carriage" and that there "must be some continuity for the Commission to act upon, either actual or by virtue of an expressed intent."[6]

It is apparent that both the courts and the Commission have applied to tariff interpretations the principle of intent and control in determining whether transit or some other tariff provision is applicable. It is equally apparent that the intent cannot be measured alone by the intent of one of the parties concerned with the shipment. As we have already shown, the Navy clearly intended to control the shipments in order that it could secure the advantage of special rates (Section 22 and land grant rates) which were available to it. The manner of billing the shipments and other incidents of handling indicate beyond any doubt that the Government intended to make separate, distinct and new shipments from Mansfield, independent of any transportation matters that may

[6] In *Baltimore & Ohio S.W. R.R. Co.* v. *Settle,* 260 U.S. 166, Mr. Justice Brandeis dealt at some length with the intention of the shipper in order to determine the nature of the movement. The decision turned on the questions of intent. See *Gulf, Colorado & S.F. Ry. Co.* v. *Texas,* 204 U.S. 403; *Chicago, Mil. & St. P. Ry.* v. *Iowa,* 233 U.S. 334.

be connected with the inbound movement (R. 252a-274a, 279a-280a, 284a-285a). The evidence referred to, including the bills of lading (R. 466b-479b), preponderate in favor of the proposition that the petitioner was not the shipper from Mansfield, but the actual shipper was the Government (R. 207a). *Louisville & Nashville R.R.* v. *United States,* 267 U.S. 395.[7]

1. It is claimed by petitioner (Pet. pp. 11-13) that the effect of the Commission's findings, as approved by the Court of Appeals, was contrary to the unambiguous tariffs filed by the railroads and the Commission's interpretation was based upon parol evidence which is not admissible. The Commission's interpretation of the transit tariff is not based on parol evidence in the sense alluded to by petitioner. The tariff did not make explicit provisions either excluding or including the shipments here involved, consequently an interpretation by the Commission of the coverage and meaning of the tariff provisions, as applied to the shipments, was a prerequisite to the determination of petitioner's claim.

The evidence adduced at the hearing before the Commission was considered by it in making such a determination. This necessarily involved a consideration of how the shipments were handled,

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[7] A shipper has been defined as the one who exercises control of the shipments *United States* v. *Metropolitan Lbr. Co.*, 254 F. 335, 346, and as "the owner or person for whose account the carriage of the goods is undertaken, *Campagnie Generale Transatlantique* v. *American Tobacco Co.*, 31 F. 2d 663.

the method of billing, the payment of the freight rate, the factors of intent, control and ownership.

It is respectfully submitted that under the circumstances here involved the determination by the Commission of the applicability of the tariff is conclusive upon the courts in the absence of judicially reviewable error, for they entail the making of findings of ultimate fact by an expert agency designated for the purpose. *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291-2; *United States ex rel. Kroger Grocery & Baking Co.* v. *Interstate Commerce Commission*, 73 F. 2d 948, 951-2, cert. denied 294 U.S. 712; *Illinois Cent. R.R. Co.* v. *Interstate Commerce Commission*, 206 U.S. 441, 455-6; *Texas & Pacific Ry. Co.* v. *American Tile & Timber Co.*, 234 U.S. 138, 146.

2. Petitioner argues (Pet. p. 14) that there is nothing in the contract of carriage that gives to the consignee of any shipment (whether it be a sale f.o.b. transit point or f.o.b. destination, and whether it be the Government or someone else) any control over the decision as to whether the shipment is a transit shipment or a new shipment from the transit point; and that the transit tariff gives this right only to the shipper or transit house operator.

In regard to this contention, as heretofore indicated, the rule of the cases requires that both parties must so conduct the transaction that the transit intent is carried through to destination in order to preserve the fiction of a through movement from the first origin to the last destination. The

petitioner contended below that the intent of the Navy to sever the continuity of the shipments was not communicated to it or to the railroads, which is contrary to the evidence.

Of course, there was no duty on the Navy to advise petitioner or even the railroads in the matter since transit is optional and only the intent to employ transit need be communicated to the carriers. Yet the Navy's intent not to avail itself of the transit tariffs was made known to the carriers. Further, the Navy had no legal obligation to protect petitioner's interest in any lower rates in the circumstances. It was more economical for the Navy to use local rates from Mansfield than to bear its proportionate share of the through rates. In any event, no benefit would acrue to it from the operation of a transit house at Mansfield.

3. It is claimed by petitioner (Pet. pp. 14-15) that the transfer of title had no effect on the continuity of the movement, and that the tariffs do not require the payment of the outbound charges. In answer to this contention, we desire to point out that while the passing of title might not be controlling yet it is a factor to be taken into consideration along with all the other facts and circumstances to which we have alluded, such as control and intent. The element of ownership is important for as pointed out *in Campagnie Generale Transatlantique* v. *American Tobacco Co.*, 31 F. 2d 663, 667, the shipper is "the owner or person for whose account the carriage of the goods is undertaken."

Although, as petitioner states, the tariff does not

specifically require the payment of the outbound charges, yet it obviously does not forbid it. Neither do the alternate provisions in the tariff prove of any aid to petitioner's position in the circumstances here involved.

4. Finally, petitioner argues (Pet. pp. 16-17) that there was no substantial evidence in the record to support the Commission's finding of the Navy's intention to control the outbound shipments from Mansfield. We have previously shown that this contention is absolutely unfounded and no useful purpose would be served in a further discussion of this point.

However, we would like to say a word in regard to petitioner's statement (Pet. p. 17) that Lt. Dippold of the Navy testified that petitioner "was shown as the shipper on the bills of lading because 'They are the actual shipper.'" We submit that this statement was modified by the witness at a later point in his testimony. The testimony of this witness, appearing at pages 275a-276a of the record, explains his purpose in stating that petitioner was the shipper. He there stated that the purpose of showing the petitioner as the shipper on the Government bills of lading, was to help the Navy "to identify the material, where it was coming from, in connection with our purchase order" (R. 276a).

The evidence of record clearly reveals that the bills of lading were issued by the Government and in filling in the details on the bills of lading petitioner acted as agent for the Government. It also

acted as agent in making other arrangements for the second leg of the journey of the shipments from Mansfield. The testimony of Lt. Dippold (R. 280a) further shows that the Navy furnished petitioner with shipping instructions as to how the shipments were to be routed (via what railroads) so as to spread the traffic to different destinations, and to secure the most favorable rates.

The elements of ownership, control and intent having been established in the Navy and the petitioner having lost control at Mansfield, there is no doubt that it is not entitled to claim any readjustment of the freight rates on the basis of through rates.

We believe the record in this case is convincing that no error was made in the construction of the tariff and that there is substantial evidence on the record as a whole to support the Commission's action in this case. We further believe that no question of general importance is presented and no conflict with the decisions of this Court or any other court is shown.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SAMUEL R. HOWELL,
Associate General Counsel.

JULY, 1955.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 940393 1955

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FILED
SEP 16 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1955

No. [redacted] 68

GREAT LAKES STEEL CORPORATION,
a Delaware Corporation,
Petitioner,
vs.
UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
THE BALTIMORE AND OHIO RAILROAD COMPANY,
ERIE RAILROAD COMPANY, and the
PENNSYLVANIA RAILROAD COMPANY,
Respondents

REPLY BRIEF OF PETITIONER

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a lower court has reached the wrong result in deciding a case or to review the sufficiency of the evidence presented to an administrative body. On p. 11 of our petition for certiorari we stated that the effect of the decision of the Commission in this case is to prevent the application of transit tariffs to all shipments made on government bills of lading regardless of the provisions of the transit tariffs. This is certainly a question of general interest arising under the Interstate Commerce Act and one of sufficient importance, particularly to government contractors and to the railroads, to warrant consideration by this Court. Hence the decision in this case involves much more than the bare right of Petitioner to recover from the Railroads the amount of the claimed overcharges or the review of findings of fact made by the Commission.

Before considering the effect of the Commission's decision it might be well to note the disagreement between the Respondents as to what the Commission actually decided in this case. On p. 11 of the Commission's brief it is stated that the Commission arrived at its decision in this case by an interpretation of the various tariff provisions, which, the brief implies, were in some respects ambiguous or uncertain. The brief of Respondent Railroads (p. 37) denies any such interpretation on the part of the Commission saying, "It was not necessary for the Commission to make any finding concerning the terms of the transit tariffs, since it found that the shipments were separate and distinct".

If the Commission's decision in this case is based on its interpretation of the particular provisions of the transit tariffs, such fact was very well concealed in the Commission's opinion (Appendix 1 to Petition for Writ of Certiorari). The opinion of the Commission is completely barren of any reference to any provision of the transit tariffs asserted to be ambiguous or uncertain. It completely fails either to point out or to mention any provision which should

have been inserted in the tariffs which would resolve any claimed ambiguity or uncertainty. Except for reference to the fact that the tariffs provided two methods by which the benefit of the transit tariffs could be obtained and limited a shipper to the use of only one of these methods, the opinion of the Commission contains no discussion whatever of the tariffs involved or any of their provisions, or makes any finding that there was any failure to comply with any provision of these particular tariffs. On the contrary, the opinion of the Commission shows quite plainly that it determined that the facts existing in this case showed such a break in the continuity of the shipments as to preclude the application of transit tariffs or the use of the theory of transit, regardless of the provisions of the transit tariffs. If, on the other hand, as the Commission now asserts, the Commission arrived at its decision by a construction of the terms of the tariffs, it completely disregarded all proper rules of construction which it should have followed in interpreting the tariffs. These rules and the decisions announcing them, including decisions of the Commission itself, are set forth on pp. 12 and 13 of the petition for writ of certiorari.

The tariffs, by their very terms, were to be applied to all shipments complying with the conditions set forth in the tariffs. Rule 1 of the tariff of the Erie Railroad Company (I. C. C. Ex. 63, Rule 1, p. 404b) provided that subject to the rules, regulations, conditions and charges therein set forth, carload shipments of the articles listed in the tariff when originating in the prescribed territory, might be forwarded to Mansfield, Ohio, for the purpose of fabricating, and reshipped therefrom to the prescribed destinations.

Rule 2 of that tariff stated that the privilege of fabricating "will be granted only to operators of fabricating plants who keep records, file reports and handle shipments in the manner prescribed herein, and permit inspection of records * * *" (p. 405b).

Rule 5 of the tariff of the Baltimore & Ohio Railroad Company provides that to be entitled to the transit privileges accorded under that tariff, transit operators will be required to make written application in the form and manner provided in the rule. (I. C. C. Ex. 65, p. 413b.)

Rule 10 of that tariff states that transit privileges will only be accorded "shippers, transit house owners or operators who comply with these rules, keep records in the manner prescribed in Rules 15 and 25, and make statements, when requested, as to tonnage and representative freight bills on hand, and make affidavit, when required, as to the accuracy of such records and statements, and permit inspection thereof, * * *." (I. C. C. Ex. No. 65, p. 413b.)

Rules 5 and 10 of the tariff of the Pennsylvania Railroad Company are in all material respects identical with Rules 5 and 10 of the Baltimore & Ohio Railroad Company tariff. (I. C. C. Ex. 68, p. 437b.)

While the tariffs are lengthy and contain many conditions, qualifications and limitations, there was no qualification, condition or limitation which made any reference to or which in any way depended on any of the facts found by the Commission in its decision, and the Commission's decision did not purport to find the tariff privileges inapplicable because of any such qualification, condition or limitation. While the opinion of the Commission did not say so in explicit language, the decision of the Commission denying the applicability of the transit tariffs was based solely on the fact that the shipments here under consideration moved on government bills of lading, and in so holding the Commission completely disregarded Condition #2 on the back of each government bill of lading which reads as follows:

> "2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject

> to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier." (I. C. C. Exhibits 77 and 78, pp. 477b and 478b.)

We shall amplify this later in this brief. We mention it at this point only to show that if the Commission arrived at its decision as a result of interpretation of either the transit tariffs themselves or of the bills of lading, the decision of the Commission was clearly wrong and should have been set aside by the lower courts.

We think the statement in the Railroads' brief, that the Commission did not make any finding concerning the terms of the transit tariffs since it found that the shipments were separate and distinct, is correct. We assert, however, that its finding that the shipments were separate and distinct, is not only completely without support in the record but is based on findings which, if supporting that conclusion, prohibit the application of transit tariffs to any shipment where the movement from the transit point is made on a government bill of lading. The entire substance of the Commission's decision is included in two sentences reading as follows:

> "It was the purpose of the Navy Department to make new shipments from Mansfield, independent of the inbound movements."
>
> * * * * *
>
> "The continuity of the shipments under consideration was terminated at the transit point when the Navy Department, which became the owner of the goods when they were loaded on cars at Mansfield, elected to ship them from that point as separate and independent shipments."

We submit that there was no competent evidence on the whole record from which the Commission could conclude that the Navy Department had any purpose or intent which could destroy the right of Petitioner under the transit tariffs or, to state it otherwise, which could establish any break in the continuity of the shipments, unless the bare fact of the use of a government bill of lading, in and of itself, establishes such a break.

The nearest approach to any such evidence is the following testimony of Lieutenant Dippold of the Navy Department:

> "Q. (By Mr. Cole): Was it or was it not the desire and aim of the Bureau of Yards and Docks in preparing such government bills of lading, showing Mansfield as the shipping point, to make separate, distinct and new shipments from that point independent of any transportation matters that may be connected with the inbound movement or movement of materials into Mansfield prior to it being worked up into the condition in which it was being shipped out on the bill of lading?
>
> "A. To the best of my recollection, yes.
>
> "Q. (By Mr. Kaier): That is 'yes', new shipments were intended?
>
> "A. (Witness indicates 'yes'.)
>
> "Mr. Cole: He is shaking his head 'Yes'.
>
> "The Witness: New shipments were intended." (p. 279a.)

But this is not sufficient substantial evidence to support the finding of the Commission for two reasons: First Lieutenant Dippold's statement of a *general* intent in the part of the Navy Department is directly contradicted by his testimony as to *specific facts.* Second, because the "desire and aim" of the government to make "separate, distinct and new shipments" is in no way determinative of

whether the shipments are in fact continuous shipments from point of origin through the transit point to point of ultimate destination.

Much has been said in the briefs of Respondents about the "intent" of the government that the shipments from the transit point be considered as independent of the inbound movements, but the very authorities which the Respondents cite in support of their position demonstrate not only that that intent is not sufficient to break the continuity of a shipment but that the government at all times had the intention which both the Commission and the Courts have said makes a shipment continuous. *Memphis Merchants Exchange v. Illinois Central Railroad Company*, 43 I. C. C. 378, pointed out the precise kind of intent that makes a transit shipment a continuous one. In that case the Commission said (p. 388):

> "The true and controlling intent which determines the essential character of the commerce is not fully matured and fixed until the party who, having the right so to do, decides, under the options lawfully available to him under the transit tariffs, what is to be the final destination of the shipment."

That same principle was applied by this Court in *Baltimore & Ohio Southwestern Railroad Company v. Settle*, 260 U. S. 166. In that case Settle shipped certain lumber from points in the South to Oakley, Ohio, and then reshipped the lumber from Oakley to Madisonville, Ohio. Since the interstate rate from the South to Oakley plus the intrastate rate from Oakley to Madisonville was less than the interstate rate from the South to Madisonville, Settle attempted, by treating this as two shipments instead of one, to obtain a lower transportation charge for the shipment. In holding that the two shipments must, as a matter of law, be considered as a continuous one, this Court pointed out that Settle's desire to have these considered as separate shipments was of no consequence; that it was

neither probable nor expected that the material would be disposed of at Oakley and that it was always Settie's intention that the material be stopped at Oakley only temporarily and would then be reshipped to Madisonville, and that it was this intention that required a determination that the shipments be regarded as continuous rather than as separate.

In *Baltimore & Ohio Railroad Company v. United States*, 24 F. Supp. 734, the Railroad brought suit to set aside an order of the Interstate Commerce Commission which, in effect, required the Railroad to grant transit privileges at Cadosia, New York, on shipments with certain origins and destinations. The Railroad had granted such rights at Cadosia on shipments having certain other points of origin and destination. Since one part of each of the transportation movements in controversy was wholly within the State of New York, the Railroad challenged the Commission's order on the ground that the Commission had no jurisdiction over an intrastate shipment, and it became necessary for the three-judge court to determine whether the two legs of the journey, one intrastate and the other interstate, formed a continuous movement so as to subject the entire movement to the jurisdiction of the Interstate Commerce Commission. The Railroad asserted that since it did not intend the two legs of the journey to be joined, the element of continuity necessary for transit shipments was lacking. It also asserted that the nature of the operation performed at Cadosia was such as to break the continuity. The Court answered this latter objection by pointing out that the Railroad itself had granted transit rights for this particular operation at Cadosia between different points of origin and ultimate destination, and that the Railroad could not therefore rely on that kind of an interruption. The Court said that intent, while not alone conclusive because no one element is that, is probably the

most important single determinative of continuous carriage, and in determining the question of continuity, said: "Here it is not material to learn where the methanol is going, but only that it is upon some through route which crosses a boundary of New York".

Applying the principles of these decisions to the case at bar, we find the following undisputed facts in this case. Petitioner certainly intended that the material would not be disposed of locally at Mansfield but would go to the destinations to which it ultimately moved. The transit arrangement at Mansfield was set up as a result of negotiations commencing with three letters plaintiff wrote to the Railroads (I. C. C. Exs. 1, 11 and 24, pp. 294b, 307b and 321b). In Exhibit 1, addressed to the Pennsylvania, plaintiff pointed out that the material would be used "for the construction of Army and Navy huts" and would move to Mansfield and "thence either East, West or South on your line". In Exhibit 11, addressed to the Baltimore & Ohio Railroad, plaintiff stated that the business was moving or would move to Army and Navy stations and that some of it would move "to New Orleans for export and possibly to other Texas and West Coast ports". In Exhibit 24, addressed to the Erie Railroad, plaintiff stated that the material would be fabricated for Army or Navy purposes and would move "to New Orleans for export or perhaps to the other Gulf or West Coast ports".

The Railroads certainly understood that the material would move beyond Mansfield because they amended their transit tariffs to permit that very thing. In their application to the Interstate Commerce Commission to put the amendment into effect on one day's notice, they stated that "The outbound traffic, after fabrication at Mansfield, would move approximately 50% to the Pacific Coast, 25% to New Orleans and 25% to New England territory" (I. C. C. Ex. 28, p. 326b).

That the government intended these shipments to move to the seaboard and thence overseas is likewise conclusively demonstrated. Lieutenant Dippold testified that the government bills of lading were issued to Great Lakes Steel Corporation "more or less in blank" (p. 288a) and that the government did not know what shipments were going to be covered by the bills of lading until the cars were loaded (p. 289a). Defendant's Witness Brenner called attention to the fact that each government bill of lading bore a reference to "ODT Block Permit OMR-NM-6600-00-N". He testified that this Block Permit was issued "to permit the movement of Navy export freight into a port area for unloading at facilities operated by the U. S. Navy" and that unless this were Navy export freight it would not have been permissible to move it into Davisville for export (p. 169a). If it had not at all times been the intention of the Navy to ship these articles overseas, or if there had been the slightest intention of taking possession of them at Mansfield or of making any other disposition at Mansfield, the Navy would not have indiscriminately issued to Great Lakes Steel Corporation bills of lading for the shipment of these articles bearing a certificate that the articles would be exported. The articles were part of Quonset huts used in great quantities by the Navy for housing personnel for overseas bases. The war was not being fought at Mansfield; the war was being fought in Europe and in the Pacific, and the controlling "aim and desire" of the government was to get the Quonset huts, of which these articles were parts, to the overseas bases as fast as possible, and for that purpose to get them to the various embarkation points for shipment overseas. There cannot be the slightest doubt that the Navy intended at all times that these articles move out of Mansfield to the various coastal ports for shipment overseas. There is absolutely no basis in the record for any holding that any of the par-

ties, Petitioner, the Railroads or the Navy, did not intend that the final destination of the shipments would be one or the other of the points to which they were ultimately shipped.

There is no other evidence in the record which will support any claimed break in continuity.

The Railroads' principal witness was Charles E. Brenner, of the Traffic Department of the Baltimore & Ohio Railroad Company. He had been so employed for twenty-five years doing "rate construction and commerce work generally" and was familiar with the issues in this proceeding (pp. 165a and 166a). He testified that if these shipments had been commercial export shipments and the technical requirements of the commercial export tariffs had been complied with by Petitioner, Petitioner would have been entitled to the same export rate paid by the government on shipments to the West Coast, and in such case the transit tariffs would have been applicable (p. 214a). The correctness of this testimony was admitted by Mr. Cole, attorney for the Railroads (pp. 693c-698c).

Respondents have pointed out a number of facts which they assert, taken together, show a break in the continuity of these shipments. Most of these were discussed and authorities for our position cited in our petition for writ of certiorari. These points and the pages of our petition where they are discussed, are as follows:

Transfer of Title (pp. 14-15)
Control Over The Shipments (p. 16)
Payment of Freight Charges by the Government (p. 16)

and the assertion that plaintiff was not the shipper of the goods from Mansfield (pp. 16-17). On this latter point, Respondents have cited certain cases in which the term

"shipper" has been held to include some one other than the person who signs the bill of lading as consignor. There is no doubt that the word "shipper" can be an elastic term and that at times its meaning must be determined from the context in which it is used. Where, however, the transit tariffs granted the transit right to "operators of fabricating plants who keep records, file reports and handle shipments in the manner prescribed herein" (I. C. C. Ex. 63, Rule 2, p. 405b) or to "shippers, transit house owners or operators who comply with these rules, keep records in the manner prescribed in Rules 15 and 25, and make statements, when requested" (I. C. C. Ex. 65, Rule 10, p. 413b; I. C. C. Ex. 68, Rule 10, p. 437b), it is obvious that the person who is entitled to the rights granted by these tariffs is the transit house operator and not the person who, under certain definitions, might be included in the term "shipper". This is demonstrated additionally by the following provision which appears identically in each of the tariffs:

"SHIPPER'S CERTIFICATE

"In instance where the transit operator at the transit point, for commercial reasons, forwards shipments from the transit point in the name of another party, firm or corporation, the actual transit operator must add to the shipping certificate the following:

"For commercial reason the shipment from..... .....(Station) in car (Car initial and Numbers) shows consignor as (Name of Firm).

.....
Signature of Transit Operator

"This form must be properly filled out with shipping directions for each outbound car."

(I. C. C. Ex. 64, Rule 15, p. 411b; I. C. C. Ex. 65, Rule 65b, p. 414b; I. C. C. Ex. 68, Rule 65b, p. 439b). This rule was not applicable to any of the shipments involved in this case because in every instance Petitioner was designated on the bill of lading as the "shipper" or "consignee". (I. C. C. Exs. 77-79, pp. 467b-479b.) But it indicates plainly that the person who was in control of the shipment so far as determining the use of the transit tariffs is the transit house operator.

The control which the Navy could exercise over these shipments after they left Mansfield was precisely the same as the control any commercial consignee could have exercised over a commercial consignment. The only thing that either of them could do after the cars left Mansfield, was to divert them to some point not covered by the transit tariffs. Respondents make the point that Lieutenant Dippold testified that the government was not interested in the shipments to Mansfield. The government's interest in the shipments to Mansfield was precisely the same as would be the interest of any commercial purchaser of the goods f. o. b. Mansfield. It was necessary that the material get to Mansfield in order that it might be fabricated, whether Petitioner's sale was to the government or to a commercial purchaser.

The only argument left on which to base any claim of break in continuity in these shipments, as distinguished from commercial shipments, results from the fact that the government was the purchaser and that the shipments were made on government bills of lading. In considering this, it must be borne in mind that each government bill of lading specified on the back that "unless otherwise specifically provided or otherwise stated hereon, this bill of lading, is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor

by the carrier". (I. C. C. Exs. 78 and 79, pp. 478b and 479b.)

Two differences are claimed to have resulted from the fact that the outbound shipments were made on government bills of lading: the first is that where shipment is made on government bill of lading the railroad agrees to look only to the government for payment of freight charges. But this Court has held plainly that so long as discrimination does not exist, a carrier may contract to look only to the consignee for payment of freight charges. *Louisville and Nashville Railroad Company v. Central Iron and Coal Company,* 265 U. S. 59. The other is the claim that the government, on the shipments from Mansfield, paid a lower rate than would have been available on commercial shipments.

The Commission's opinion and the briefs filed in this case make reference to the government taking advantage of so-called "Section 22 Quotations". This should not create the impression that the government received a special rate on these shipments and that Petitioner is attempting to take advantage of it.

Section 22 of the Interstate Commerce Act (49 U. S. C. A. 22), among other things, authorizes a carrier to transport property of the government free or at reduced rates. Railroads' Witness Brenner testified that the rates paid by the government on shipments to Davisville and Norfolk were not "Section 22 Quotation" rates but were the "Public Export Rates" (p. 242a). There cannot be any question that on those shipments the government did not receive any special rate. The effect of the rates given on shipments to Gulfport will be hereinafter discussed. Those were concededly land-grant rates. The claim is made, however, that the shipments to the West Coast were carried at a special rate to which only the government was entitled. This is not so.

Witness Brenner identified Exs. 81 and 82 (pp. 482b-486b) and testified that because of these exhibits the government paid the export rate of 63¢ on shipments to the West Coat (pp. 171a-172a). An examination of these exhibits will show that they did not offer the government any special rate. They did provide that on shipments by or for the account of the various departments of the government, the export rate could be made applicable without complying with certain technical conditions of the export tariffs designed to assure that the material shipped would be exported. These conditions are set forth in Exhibit 80 (pp. 480b and 481b). These are the identical regulations which the Commission has held "constituted unreasonable regulations" during wartime in *Peden Iron and Steel Company v. Texas and New Orleans Railroad Company.* This case is reported twice, 264 I. C. C. 769 and 268 I. C. C. 562, the first citation being an opinion of a division of the Commission and the second an opinion of the full Commission. This case is discussed on pp. 28-29 of the brief filed by Respondents Railroads. In their brief, the Railroads state that the rates provided in the export tariff were held inapplicable because of failure to comply with regulations similar to those set forth in Exhibit 80. An examination of both opinions of the Commission will show that this is not so. These special provisions of the export tariff were held clearly to be unreasonable regulation during wartime and it was held that "In any circumstances relating to control of the transportation, whether by the Navy or complainant, the latter had the right to regulations and charges that were wholly reasonable for the transportation of export traffic, considering the emergency conditions and the required handling under those conditions." (268 I. C. C. 564.) The export rates were held inapplicable in the *Peden* case only because the export tariffs contemplated shipments directly from Chicago to the West Coast and the shipments

there involved moved over a circuitous route via Houston, at which point they were stopped for fabrication in transit. There can be no question that under the *Peden* case a commercial shipper during wartime could not have been deprived of the benefit of the export tariffs merely because of his inability, due to wartime conditions, to comply with the provisions of the export tariffs set forth in Exhibit 80.

This leaves the shipments to Gulfport. The rates paid on these shipments were land-grant rates, rates to which a commercial shipper would not have been entitled. If these particular shipments did not comply with the provisions of the transit tariffs, which required that the shipments from the transit point pay the "lawful rate", perhaps the transit tariff should be held to be inapplicable to those shipments; but there is no reason why that should affect the transit right on shipments which clearly did comply with the provisions of the tariffs, and the shipments to Gulfport are not very important in this case since they constituted only a small part of all of the shipments involved.

The only effect of giving the government a lower rate on the shipments to Gulfport would be to decrease the amount of the refund to which Petitioner would be entitled under the transit tariffs. The tariffs provided that where the claim method was used, an adjustment of freight charges would be made on the basis of the lawful rate from point of origin via the transit point to final destination. (Ex. 64, Rule 12, p. 410b; I. C. C. Ex. 65, Rule J50, p. 420b; I. C. C. Ex. 68, Rule K35, p. 445b.) The purpose and the effect of these rules is to give to the Railroad, as a net transportation charge for the entire movement, the rate applicable from point of origin via the transit point to point of ultimate destination plus the transit charge. To the extent that this aggregate amount is less than the total transportation charges paid on the inbound and outbound movements,

the transit house operator is entitled to a refund, but the less the government paid on the outbound shipments the smaller would be the refund. Any advantage given to the government in the form of lower rates would come out of Petitioner and not out of the Railroads.

The authorities which we have cited in this brief and in the petition for writ of certiorari establish conclusively that had Petitioner's customer been a commercial purchaser f.o.b. transit point rather than the government, plaintiff would clearly have been entitled to the rights granted by the transit tariffs. The outbound shipments (except those to Gulfport) would have been made at the same rates as those paid by the government, and the intention of a commercial shipper that the inbound and outbound movements be considered as independent of each other would not have affected this result. In such a situation the transfer of title to the purchased property, the actions performed by Petitioner as a shipper, the control of the traffic after it left the transit point, the designation by the purchaser of the routes over which the property was to be shipped and the payment of freight charges from transit point to ultimate destination by the purchaser, would have been precisely the same as occurred in connection with the shipments here involved.

We submit therefore that the decision of the Commission is supportable only on the theory that there is such a difference between a commercial shipment and a shipment on government bill of lading as to make the "desire and aim" of the government the controlling factor as to continuity in the one case where the desire and aim of the commercial purchaser would be of no importance in the other.

There was no evidence to show any reason for the "desire and aim" of the government. No such reason is asserted in the briefs filed in this case except that by treat-

ing them as separate the government might obtain a lower rate on the outbound movement, but this basis for treating the movements as separate was expressly repudiated by the Commission in *Memphis Merchants Exchange v. I. C. R. R., supra,* and by this Court in *Baltimore & Ohio Southwestern Railroad Company v. Settle, supra,* and in *United States v. Erie Railroad Company,* 280 U. S. 98.

In the final analysis, Petitioner's rights under the transit tariffs were denied by the Commission solely because the government, rather than a private individual, was the purchaser of the goods shipped. The effect of such a decision on the government and on government contractors is obvious. The transit house operator looks to the refund available under the transit tariffs to reduce his overall cost of production. All other things being equal, the inevitable result of the decision is to increase the cost of performing government contracts over commercial contracts. This added cost must either be borne by the government contractor or passed on to the government, and this added cost, which goes into the pockets of the railroads, and which results solely from increased transportation costs, is directly contrary to the theory of Congress in enacting Section 22 of the Interstate Commerce Act which was intended to provide the government with lower rather than higher transportation costs. Whether the exclusion of traffic moving outbound from the transit point on government bills of lading results from interpreting an unambiguous tariff so as to include an exception not set forth in the tariff or from a determination that the mere fact that the traffic moves on a government bill of lading itself creates a break in the continuity, the result is to deprive a transit house operator of the rights of the transit tariffs on all sales made to the government f.o.b. transit point.

We submit that this is a question of such importance as to warrant the consideration of this Court, that the precise question thus stated has never been but should be settled by this Court and that in reaching their decisions, the lower courts have failed to follow applicable decisions of this Court.

It is respectfully submitted that the writ of certiorari should issue.

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Office - Supreme Court, U. S.
FILED
SEP 30 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 68

GREAT LAKES STEEL CORPORATION, a Delaware corporation,

Petitioner,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, ERIE RAILROAD COMPANY, and THE PENNSYLVANIA RAILROAD COMPANY,

Respondents.

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SECTION 22 QUOTATIONS

Petitioner (p. 15 of Reply Brief) states that the Government did not secure any special rate to the West Coast. The export rate was available only upon complying with the requirements of the tariff in which the export rate was published (194a). These requirements are set forth in Exhibit 80 (480b, 481b, 269a). None of these shipments did comply with these rules (171a). In *Peden Iron & Steel Co.* v. *Texas & N. O. R. Co.*, 264 I. C. C. 769 and 268 I. C. C. 562, it is made clear that upon failure to meet the requirements of the export tariff, the export rate would not

apply, and the domestic rate would apply. The question in the *Peden* case then was what was a reasonable rate. That issue of the reasonableness of the rate is not involved in our present case. In *Mack Mfg. Corp.* v. *Alton & S. R. Co.*, 263 I. C. C. 331, the Commission at page 334 states:

> "We have found repeatedly, that unless all the conditions of export tariffs naming rates lower than domestic rates are complied with, the lower export rates are not applicable. *Atlantic Lbr. Corp.* v. *Southern Pac. Co.*, 241 I. C. C. 461.
>
> "The only remaining question which might be raised is whether the charges as such were unreasonable. Complainant presented no evidence concerning that issue other than a statement of the rates and charges which were applicable under the provisions of the domestic tariff and those which would have applied under the export tariff. Manifestly, such a comparison is insufficient to sustain a finding that the higher domestic rates and charges were unreasonable."

The question of establishing a reasonable rate did not become a problem as to these shipments because the Government was accorded Section 22 quotations (171a, 485b, 269a), which accorded the Government the rates in the export tariff without requiring compliance on the part of the Government, with these requirements of the tariff. Petitioner could not benefit from these special Section 22 quotations to the Government.[1] As shown in our brief, page 30, if the export rates were available for use by Petitioner, then the Government would not have paid 63 cents, but a land grant rate of 39.971 cents, per cwt. In *Union Pacific Railroad Co.* v. *United States*, 132 Fed. Supp. 230, the same rules and requirements of the export tariffs were considered. The Government there was questioning whether it was limited to its right under Section 22 quota-

[1] Authorities on page 30 of our brief.

tions, according to it the export rate without compliance with the conditions, or whether it could disregard the conditions and secure land grant deductions from the export rate. At page 232 the court states:

> "As set out in our findings, the defendant did not comply with a number of conditions in connection with Items 235, 270, 285 and 290 of TCFB Export Tariff 29 Series. For these reasons the defendant is manifestly not entitled to land-grant deductions on these particular items."

It is patent that through the Section 22 quotations the Government was able to make these shipments from Mansfield at a lesser rate than was available to a commercial shipper. Petitioner at page 16, refers to shipments to Gulfport, which were made at net land grant rates, and states that perhaps the transit tariff should be held inapplicable to those shipments if they did not comply with the provisions of the transit tariffs, which require that the shipments from the transit point must pay the "lawful rate." These movements under Section 22 quotations would meet the same problem. It is clear that the transit tariffs were not complied with, in that the tariffs require payment of the lawful rate or tariff rate on the outbound shipment (our Brief, Page 37). This, too, is an item to be considered on the question of intent, for if through transited shipments were intended, it is submitted that this requirement as to payment of the lawful charges would have been met. The matter was called to the attention of Petitioner (see Exhibit 47, pages 367b and 368b, 269a).

As pointed out in our brief beginning at page 26, the Government did make new and independent shipments from Mansfield. We there outline the evidence as to the intent and the procedure adopted in order to carry out that intent.

In *Reduced Rates on Returned Shipments*, 19 I. C. C. 409, at page 417 the Commission stated:

> "Once let it be conceded that the inbound and outbound movements are separate and distinct and the impropriety of applying any rates other than the regularly established locals would be self-evident."

In *Great Northern Ry. Co.* v. *Commodity Credit Corp.*, 77 Fed. Supp. 780, the court at page 787 stated:

> "Where the inbound and outbound movements are wholly independent and distinct no fiction can convert them legally into a continuous or through movement."

As stated by the Commission, the continuity of the shipments was terminated when the Navy, which became the owner of the goods when they were loaded on cars at Mansfield, elected to ship them from that point as separate and independent shipments. And complainant, having lost control of the goods, could not restore the continuity of the shipments, and is not entitled to readjustment of the charges on the basis of the through rates from the points of origin to the final destinations.

As stated in *Memphis Merchants Exchange* v. *I. C. R. R. Co.*, 43 I. C. C. 378, at 389:

> "Manifestly, the shipper, consignee, or owner of a shipment cannot treat the different stages or steps of the completed movement of the traffic as a single unit for some purposes and as separable or local movements, in part, for other purposes."

Where the Government makes shipments from the point at which it secures title to the goods, here Mansfield, Ohio, in the method outlined in our brief at page 26, which enables the Government to secure advantages to it because

that transportation is "for the United States," the shipments could not at the same time be considered as but part of shipments made by the people who arranged for the goods to be moved to Mansfield.

THE SETTING UP OF TRANSIT ARRANGEMENTS AT MANSFIELD.

Petitioner in its Reply at page 9, refers to the setting up of the transit arrangements at Mansfield as indicating that the parties intended that the goods would not be disposed of locally, but would go to the destinations to which they ultimately moved. The evidence concerning the changes in the territorial provisions of the transit tariff is carried in Exhibits numbered from 1 (294b) to 28 (328b), (269a), and shows that Petitioner was making arrangements for *its* transit at Mansfield. These exhibits show that these arrangements were set up prior to August 27, 1942. The evidence shows that Petitioner did not know until August 27, 1942, that the Government was to ship these goods out of Mansfield (71a). When this fact became known, Petitioner addressed a letter to each of the railroads at Mansfield, dated August 27, 1942 (Exhibits 29, 329b; 30, 330b; 31, 331b, 269a). In that letter the three roads were advised that the outbound movements would be on Government bills of lading with freight charges collect, and that Petitioner understood that they could make an adjustment under the transit privileges.

Petitioner was promptly advised that transit could not be accorded under such circumstances (246a, 247a), because it was understood that the Government takes possession of the fabricated material at the transit point and ships it locally therefrom (531b, 532b, 269a). Petitioner took the position that they would go ahead on the assumption that their claim would be recognized (246a, 531b, 269a). It is

clear that during the preliminary stages of setting up the possibility of transit arrangements for Petitioner, it was not known that the Government was to make its shipments from Mansfield. While the parties knew where the goods were going, there was no development of the intent of the Government to make separate shipments. Our problem in determining whether transit occurred, is not solved by learning that the goods necessarily were sent to Mansfield, there fabricated, with the knowledge that they were to be shipped to theaters of war. If this solved the problem there would never be anything but transit at a manufacturing point. The question the Commission had for determination was whether the movements to and from Mansfield were separate and independent shipments, or constituted one continuous through movement under the provisions of the transit tariff. This question is determined by the intent of the parties, and that intent must be ascertained from all of the facts, circumstances and conditions pertaining to the traffic. See our brief, page 22, et seq. and *Baltimore & O. R. Co.* v. *United States,* 24 Fed. Supp. 734, where at 736 the court states that the reason why such interruptions are held not to break continuity "is because of the intent *of the parties at the outset to unite all parts of the carriage.*" That intent to unite all parts of the movements does not exist here, as shown in our brief, page 26 et seq.

Petitioner continued to insist upon its contention that it was entitled to transit allowances (115a). This situation was analogous to that presented in *Lowden* v. *Simmonds etc. Grain Co.,* 306 U. S. 516, where the shippers ordered cars equipped with grain doors and advised that they would decline to pay for the service of installing such doors, on the ground that it was the duty of the carrier to fully prepare the cars. The carriers furnished cars fully equipped and sued for the charge of installing the grain doors. The court stated at page 520:

> "The announcement that respondent would decline to pay for them in no way qualified the request for tariff services, and cannot now stave off liability. The petitioners could disregard this advance disclaimer of liability and rely upon the courts to enforce observance of the tariff. Until changed, tariffs bind both carriers and shippers with the force of law."

The assessment of freight charges cannot be affected by considerations of estoppel. *L. & N. R. R.* v. *Central Iron Co.*, 265 U. S. 59, 65; *Pittsburgh & C. Ry. Co.* v. *Fink*, 250 U. S. 577, 583; *Davis* v. *Henderson*, 266 U. S. 92, 93; *Louis. & Nash. R. R.* v. *Maxwell*, 237 U. S. 94, 97. Certainly the paramount right of the Government, as the owner of the goods f. o. b. cars Mansfield, to make separate shipments therefrom if that was to its advantage, could not be limited or affected by Petitioner's early negotiations with the carriers setting up the possibility of transit arrangements at Mansfield, before it was known, even by Petitioner, that the Government was to make separate shipments from Mansfield.

THE GOVERNMENT'S INTEREST

Petitioner contends at page 18 of its Reply, that the rights under the transit tariff were denied to it solely because the Government, rather than a private individual, was the purchaser of the goods shipped. At page 17 of the Reply, Petitioner contends that the intention of a commercial shipper that the inbound and outbound movements might be considered independent would not have affected the result if these were commercial shipments.

Petitioner loses sight of the very basis upon which transit rests. Transit is judged by the intent of the parties controlling the movement of the traffic, and there are instances considered in the reports setting up this rule where com-

mercial operators did not intend that transit take place and it was not considered as having been accomplished. *Lake Charles Rice Milling Co., Inc.* v. *Brimstone R. & C. Co.*, 197 I. C. C. 1, 13; *Givens* v. *Director General*, 92 I. C. C. 63, 65. The rule applied is no different in connection with the Government, than as to any other parties who might conduct operations which are governed by such rules.

Petitioner also contends that the effect of the decision on the Government and Government contractors would be to increase the cost to the Government, contrary to the theory of Congress in enacting Section 22 of the Interstate Commerce Act, which was intended to provide the Government with lower rather than higher transportation costs. Petitioner is in error. We have referred to the fact, supra, that a transit operation could not have been consummated unless tariff rates were paid from the transit point to destination. It certainly would not have cheapened the cost of this material to the Government by requiring the Government to pay the tariff rates from Mansfield (see our Brief, pages 30 and 31 and Exhibit 84, 516b, 269a, setting out these rates) on all of its shipments in order that Petitioner could then secure a refund of the major part of its transportation costs in getting the material to Mansfield. There can be no question but what under these arrangements, the Government would have been unable to avail itself of net land grant rates or Section 22 quotations in connection with the making of its shipments from Mansfield, Ohio.

CONCLUSION

The District Court in its opinion reported in 115 Fed. Supp. 31, and the Court of Appeals for the Sixth Circuit, in its order reported in 220 Fed. (2) 751, both find that upon the record considered as a whole, substantial evidence exists supporting the order of the Commission.

We submit that the petition for writ of certiorari should be denied.

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